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NATURAL LAW AND THE THEORY OF SOCIETY

VOLUME II

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NATURAL LAW AND THE THEORY OF SOCIETY

1500 TO 1800

BY

OTTO GIERKE

With a Lecture on

The Ideas of Natural Law and Humanity

by ERNST TROELTSCH

TRANSLATED WITH AN INTRODUCTION

BY

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VOLUME II

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GIERKE'S NOTES

§14. THE NATURAL-LAW CONCEPTION OF THE STATE

1. After the sketch given in my work on 'Johannes Althusius and the natural-law theories of the State', the only matter on which I need to go into detail here is the relation of the natural-law doctrine of the State to particular problems which are of special importance in the history of the theory of the Corporations; and for the rest I shall content myself with giving references to that work. . . . I have not worked through the large body of literature which has appeared since the completion of this subsection. But I may refer to the Addenda to the second and third editions of my work on Althusius for an account of my attitude to views differing from my own which have been put forward since I first wrote.

2. This is the case with] Oldendorp (1480–1561), *Jurisprudentia naturalis, gentium et civilis exegesis*, Cologne, 1539 (*Opera*, 1, pp. 1 sqq.); N. Hemming (1513–1600), *De lege naturae apodictica methodus*, Wittenberg, 1652 (also printed in Kaltenborn, II, pp. 168 sqq.), G. Obrecht, *De iustitia et iure*, in *Selectiorum disputationum*, Strasburg, 1599, no. 1, B. Winkler (1579–1648), *Principiorum juris libri V*, Leipzig, 1615 (Kaltenborn, II, pp. 45 sqq.), B. Mesmer, *De legibus*, Wittenberg, 1616; John Selden (1584–1654), *De jure naturali et gentium, juxta disciplinam Ebraeorum*, London, 1640. See also Bolognetus (1539–85), *De lege, jure et aequitate*, in *Tract. Univ. Jur.* 1, fol. 289–324. *Early works on Natural Law*

3. See Franciscus Victoria (Dominican, † 1546), *Relationes tredecim*, Ingolstadt, 1580, Dominicus Soto (Dominican, 1494–1560), *De iustitia et jure*, Venice, 1601 (first published 1556), F. Vasquez (1509–66), *Controversiarum illustrium aliarumque usu frequentium libri III*, Frankfort on the Main, 1571; Gregorius de Valentia (Jesuit), *Commentarii theologici*, Ingolstadt, 1591, II, *Disp.* 1, Balthasar Ayala (1548–84), *De jure et officiis bellicis*, Antwerp, 1597; Ludovicus Molina (1535–1600), *De iustitia et jure tomi VI*, Mainz, 1614 (and also in 1602), Leonhardus Lessius (Jesuit, 1554–1623), *De iustitia et jure libri IV*, 3rd edition, Antwerp, 1612 (first published in 1606), Cardinal Robert Bellarmine (1542–1621), *De potestate summi pontificis in rebus temporalibus*, Cologne, 1611 (first published in 1610); Johannes de Lugo [Jesuit], *De iustitia et jure*, ed. nova, Lyons, 1670. *Ecclesiastical writers on Natural Law*

4. F. Suarez (Jesuit, 1548–1617), *Tractatus de legibus ac Deo legislatore*, Antwerp, 1613 (first published in 1611)

5. Hugo Grotius, *De jure belli ac pacis libri tres*, 1625; the edition used by the author is that published at Amsterdam, 1701

6. See Machiavelli (1469–1527), *Il principe* (first published in 1515), and the whole body of literature written about and against him. *Political writings on practical questions*

See also the numerous 'Mirrors of Princes' and cognate writings, such as: G. Lauterbeck, *Regentenbuch*, new edition, 1559, Cicerus, *De Regni institutione*, Cologne, 1571, Wiremund de Erenbergk (Eberhardt von Weyhe), *Aulopolitica*, 1596; Hippolytus a Collibus, the *Principe* (1598), and the *Gentleman*, the *Palatine* and the *Nobile*, edited together, with additions, by Nauroth,

Frankfort, 1670, Marchemont Nedham, *Justitia principis christiani*, Strasburg, 1608, Tyrope, *Arcana ejusdem principum*, Cologne, 1649 (first published in 1617); Georg Engelhardt von Löhneyss, *Hof-, Staats- und Regierkunst*, 1622; Carolus Scribanius, *Politico-Christianus*, Münster, 1605; Ambrosius Marliarus, *Theatrum politicum*, Danzig, 1645; Saavedra Fajardo, *Idea de un principe Christiano*, 1649.

See also the writings on *arcana republicae*, such as: Clapmarius (1574–1604), *De arcanis rerumpublicarum libri VI*, Jena, 1663 (first published in 1605); G. Obrecht (1547–1612), *Secreta politica*, Strasburg, 1644 (previously published in 1617). In addition, we may cite: Oldendorp, *Von Rathschlagen, wie man gute Policey und Ordnung in Städten und Landen erhalten möge*, Rostock, 1579, Fernerius, *De republica bene instituenda*, Basle, 1556, translated into German by Abraham Saur, Frankfort, 1601; Melchior ab Osse, *Tractatus*, Frankfort, 1609; Zech, *Politicorum libri III*, Cologne, 1600; Gentillet, *Discours sur les moyens de bien gouverner*, 1576; Jacobus Simancanca, *De republica libri IX*, 3rd edition, Antwerp, 1574, Laporta, *Politicorum libri VI*, Antwerp, 1604, Leys de Mayerne, *La monarchie aristodémocratique*, Paris, 1611; J. à Chokier de Surlet, *Thesaurus politicorum aphorismorum*, Cologne (many editions); Jean de Marcus, *Ministres politiques et maximes d'État*, Rouen, 1624.

Fruchter on raison d'état

7. Botero, *Della ragione di stato*, Venice, 1559, Zinzerus, *De ratione status imperiali*, Frankfort, 1618; W. F. ab Efferen, *Manuale politicum de ratione status*, Frankfort, 1630, Wangenbeck, *Fructus politicus ubertim pseudopolitices*, Dillingen, 1636. The work of Hippolytus a Lapide, *De ratione status in imperio nostro Romano-Germanico*, 1640, belongs in its general tone and treatment altogether to the purely political school, and makes the dictates of *raison d'état* superior to the requirements of Law, but in dealing with German conditions the author distinguishes sharply between (1) the analysis of the existing conditions (which is treated from a purely historico-legal point of view in Part I), and (2) political maxims (which are suggested in Parts II and III) *

8. Petrus Gregorius Tholosanus (1540–91), *De republica*, Frankfort, 1609 (first published in 1586).

Arnisaeus

9. H. Arnisaeus († 1636), *Opera omnia politica*, Strasburg, 1648. Among his writings may be specially noted: *Doctrina politica in genuinam methodum quae est Aristotelis redacta* (first published in 1606); *De jure majestatis libri III* (first published in 1610), *De autoritate principum in populum semper constitutis* (first published in 1611); *De republica seu relectiones politicae libri II* (first published in 1615).

10. H. Conring (1606–81), *Opera*, Brunswick, 1730, vol. iii.

Works on political theory not based on Natural Law

11. See B. J. Omphalius, *De civili politia libri III*, Cologne, 1565; Carus, *Spiceae civilis*, Frankfort, 1589, Albergati, *Discorsi politici*, Venice (point by point against Bodin and for Aristotle), J. Stephanus, *Demonstrationes politicae*, Greifswald, 1595; Melchior Junius, *Politicorum quaestionum centuria et tredecim*, Strasburg, 1591 (first published in 1605), J. Cruger, *Collegium politicum*, Gottsen, 1609, H. Velsteinius, *Centuria quaestionum politicarum*, Wittenberg, 1610; W. Hunder, *Systema philosophiae politicae*, Jena, 1608 (1610), C. Matthias,

* *Ratio status*, or *ratio administrationis*, as its original sense, is concerned with the state, in the sense of the general principles and the particular requirements of a State and its government. This is the sense in which e.g. Althusius uses the phrase. The idea of *raison d'état* or *Staatsraison* is a later development. Cf. F. Meinecke, *Die Idee der Staatsraison in der neuern Geschichte*.

Collegium politicum, Giessen, 1611, *Syntaxis politicae*, Giessen, 1618; C. Goclenius, *Exercitationes politicae*, Wittenberg, 1617–18, Diodorus of Tulden († 1645), *De regimine civili libri VIII* (in *Opera*, Louvain, 1700), Anton Alexander Olinarovius, *De politica hominum societate libri III*, Danzig, 1651.

13. J. Bodin, *De republica libri VI*, ed. 2, Frankfort, 1591 (first French edition 1577, first Latin 1584). On the epoch-making importance of his theory, see the modern works mentioned in the author's work on Althusius, p. 331 n. 2. [See also J. W. Allen, *Political Thought in the Sixteenth Century*, Part III, c. VIII.] *Bodin*

14. Among the writings of the so-called '*Monarchomachi*' there are pamphlets both on the Protestant and on the Catholic side which equally advocate the cause of popular sovereignty. *The Monarchomachi*

(a) On the Protestant side, the work of Hotoman (1524–90), *Franco-gallia*, Frankfort, 1665 (first published at Geneva, 1573), has still mainly an historical basis. In the anonymous treatise [probably written by Beza, Calvin's successor in Geneva], *De jure magistratuum in subditos et officio subditorum erga magistros*, Magdeburg, 1578 (first published in French, and stated on the title-page to have been published at Lyons, 1576), the arguments from Natural Law still play a secondary part. Natural Law is the basis of argument in the following: Stephanus Junius Brutus (the real author was H. Languet (1518–81), or according to others P. Duplessis-Mornay), *Vindiciae contra Tyrannos*, Paris, 1891 (first published at Edinburgh [the real place of publication was Basle] in 1579), George Buchanan (1506–82), *De jure regni apud Scotos dialogus*, 2nd edition, Edinburgh, 1580 (first published in 1579), Lambertus Danaeus, *Politicae Christianae libri VII*, 2nd edition, Paris, 1596 (first published in 1596), John Milton (1609–74), *The Tenure of Kings and Magistrates* (1648–9), *Eikonoklastes*, *Defensio pro populo Anglicano* (1651), *Defensio secunda* (1654), in his Prose Works, London, 1848 (II, pp. 2999., I, pp. 907 sqq., 3899., and 2164 sqq.) [On the three Huguenot authors first cited by Gierke—Hotoman, Beza and Languet—see J. W. Allen, *Political Thought in the Sixteenth Century*; and on the authorship of the *Vindiciae contra Tyrannos* see E. Barker, in the *Cambridge Historical Journal*, 1931 and R. Patry, *P. du Plessis-Mornay*, pp. 275–80.]

(b) On the Catholic side there are the following: Marcus Salamonius, *De principatu libri VI*, Paris, 1578 [originally published at Rome, in 1544, the writer seems to have been a Spaniard], Boucher, *De justa Henrici III abdicatione e Francorum regno libri IV*, Lyons, 1591; Guilelmus Rossaeus, *De justa reipublicae Christianae in reges impios et haereticos authoritate*, Antwerp, 1592 (first published in 1590, with a preface dated 1589), Mariana, *De rege et regis institutione*, Frankfort, 1611 (first published at Toledo, 1599).

New works on the *Monarchomachi* are mentioned in the author's work on Althusius (especially Treumann, Rehm, Landmann and Gooch). See also A. Elkan, *Die Publizistik der Bartholomäusnacht*, Heidelberg, 1905 [a work valuable for its account of Hotoman, Beza and Duplessis-Mornay], F. Aigier, *Essai sur l'histoire du droitement social*, Paris, 1906, pp. 100 sqq. [Mention may also be made of G. Weil, *Les Théories sur le pouvoir royal en France pendant les guerres de religion*, G. de Lagarde, *L'Esprit politique de la Réforme*, A. Mérly, *Les publicistes de la Réforme*; J. N. Figgis, *From Gerson to Grotius*.]

15. See C. Barclaius (1577–1608) [really 1543–1605], *De regno et regali potestate adversus Buchananum, Brutum* [i.e. the author of the *Vindiciae contra Tyrannos*], *Boucherum et reliquos Monarchomachos libri VI*, Hanover, 1612 (first *Advocates of absolutism*

published in 1600); T. J. F. Grawichelius (1600–68), *De jure majestatis*, The Hague, 1642; Claudius Salmasius (1588–1659), *Defensio regia pro Carolo I rege Angliae*, Paris, 1631.

Althusius

15. Johannes Althusius (1557–1638), *Politica methodice digesta atque exemplis sacris et profanis illustrata*, 3rd edition, Herborn, 1614 (first published in 1603). [Recently reprinted, from the 3rd edition, with an introduction by C. F. Friedrich, Harvard University Press, 1932.]

Political text-books after 1600, based on Natural Law

16. See Otho Casmannus, *Doctrina et usus politicae methodicum et brevi systema*, Frankfort, 1609; B. Keckermann (1571–1609), *Systema disciplinae politicae*, Hanover, 1607; J. Bornitius, *Paratitorum politicorum libri IV*, Hanover, 1607, *De majestate politica*, Leipzig, 1610, *Aerarium*, Frankfort, 1612, *De rerum reflexione in republica et civitate procuranda*, Frankfort, 1625; H. Kirchner, *Respublica*, Marburg, 1608; Z. Frederich, *Politicorum liber*, Strasburg, 1609; J. H. Alstedius, *De statu reverendissimorum*, Herborn, 1612, Bathus, *De republica libri III*, Francker, 1613; M. Z. Berbornius († 1613), *Institutiones politicorum libri II*, 2nd edition, Leipzig, 1685; G. Schönborner (1579–1637), *Politicorum libri VII*, 4th edition, Frankfort, 1628 (first published in 1614: a second-hand work, based upon this, is the *De statu politico sex libri VI* published at Frankfort in 1617); P. H. Hoenonius (de Hoen, 1576–1640), *Disputationum politicarum liber unus*, 3rd edition, Herborn, 1615; M. Bertius, *De natura juvenum majoribus et regnibus*, in Annuaria, 1 (1616), no. 2; König, *Acta disputationum politicarum*, Jena, 1619, Adam Contzen (Jesuit, 1575–1635), *Politicorum libri X*, Mainz, 1620, Claudius de Caran, *Mellar triparitus*, Antwerp, 1620, Menochius (Jesuit), *Hieropolitica*, 2nd edition, Cologne, 1626, Wendenhagen, *Unsprüche introducta in omnes Respublicas*, Amsterdam, 1692, C. Liebenthal, *Collegium politicum*, Marburg, 1644; N. Vernulaeus, *Dux politicus*, Louvain, 1646; Daniel Berchringer, *Institutiones politicae sive de republica*, Utrecht, 1662.

17. The reference is to Beiold's *Opus politicum*, ed. nova, Strasburg, 1626.

Hobbes

18. Thomas Hobbes (1588–1679), *Elementa philosophica de cive*, Amsterdam, 1647; *Leviathan, sive de materia, forma et potestate civitatis ecclesiasticae et civilis*, Amsterdam, 1670 [in English, under the title of *Leviathan*, 1651]. On Hobbes see particularly F. Tönnies, *Thomas Hobbes der Mann und der Denker*, Leipzig, 1912. [See also A. Levi, *La Filosofia di Tommaso Hobbes*, Milan, 1929.]

19. Compare e.g. Schoudewin on Comm. on *the Institutes*, 1, 2, Mynsinger, *Apotelesma* on L. 1 D. 1, 1; Rittershusius, *Instit.* 1, 2, pp. 83 sqq.; Otto mann, *Synopsis ad Instit.* 1, 9.

20. Compare Cujacius, *Instit.* 1, 2; Vinnius, *Comm. illustr.* cc. 7, 10 and 54; Hunnius, *Comm. in Instit.* 1, 2, *Coll. Instit. Disp.* 1, *Var. resol. jur. cap.* 1, 1, qu. 19 sqq.; Brunius, *Comm. in Instit.* 1, 2; Sylv. Aldobrandinus, *In primam Instit. Just. libros Comm.* (Venice, 1567), J. F. Overmus, *Comm. in libros Instit.* (Venice, 1566), pp. 37–8; Bachoven ab Echt, *Comm. in Instit.* 1, 2, pp. 9 sqq., *Pandect.* pp. 16 sqq., V. W. Forster, *Tract. Disp.* 1; P. Burnus, on L. 1 D. 1, 1; J. Harprecht, *Instit.* 1, 2; Wurmser, *Exerc.* 10, qu. 1; T. Schurzfleischius, *In I. lib. Instit. Just. epitome explicatio*, Brunsw. 1669, 1, 2.

21. Compare Cannanus, *Comm. jur. civ.* 1, cc. 1–7; Melchior Kling, *Instit.* 1, 2; Vigelius, *Dictatum juris centum*, 17, no. 6; Faber, *Jurisp. Papin.* 1, 2, pp. 31–37, *Rationale*, 1, 1–4; A. Matthaeus, *Comm. in Instit.* 1, 2; Ludwell, *Comm. in Instit.* 1, 2; Schaumbogen, *Lect. publ. in Instit.* 1, 2, qu. 1–7, G. Frantzke, *Comm. in Instit.* 1, 2; Lauterbach, *Coll.* 1, 1, §§ 21 sqq. Compare

also Duarenus, 1, 1, c. 5; Cujacius, 1, pp. 9sqq., VII, pp. 14sqq.; Diedericus Tuldenus, *Comm. in Instit.* 1, 2; Petrus Lagerus, *Annot. ad Instit.* 1, 2; H. Giphanius, *Instit.* 1, 2; Cothmann, *Disp.* 1, thes. 4–12, *Instit.* 1, 2, *Coll.* 1, 14.

22. More particularly, we find Ulpian's dictum about the participation of animals in Natural Law disputed, or explained as an unauthoritative mode of expression; and this leads to a rejection of the hitherto generally accepted doctrine that *jus naturale* (*or jus naturale primarium*) is a law common to men and animals, while *jus gentium* is to be regarded as a law peculiar to men. On this basis the difference between *jus naturale* and *jus gentium* was explained simply by reference to the distinction between the 'absolute' and the 'conditioned' dictates of reason, or, again, between 'original' knowledge of the law of Reason and the knowledge which is 'acquired' in the course of historical development. See Corasius, on l. 1, §1, D. 1, 1; Cornanus, loc. cit.; Forster, op. cit. no. 30, Buchowen von Eckt, op. cit. p. 11; Ludwell, loc. cit. *Natural Law and Jus gentium*

23. See especially Cornanus, *Comm. jur. civ.* 1, c. 4. Compare also Boxhorn, 1, c. 2, §§ 3–8, c. 3, §§ 15sqq., and the Commentary of an ex-professor of Jena on the Codex, 1, 1–13, in G. A. Struvius, *Jus sacrum Justin.*, Jena, 1668, Prooemium.

24. See Hotoman, *Instit.* 1, 2. pr., Vultejus, loc. cit., Giphanius, loc. cit.; Forster, *Tract. Disp.* 1, no. 29, Wurmser, *Exerc.* 1, qu. 3 [*jus publicum et privatum naturalibus, gentium et civilibus collatum est*]

26. Thinkers who maintained the theory that only a condition of universal liberty and community of property corresponded to pure Natural Law, and that government and property first came into the world through the corruption of human nature and the breach with pure Natural Law which was thereby involved, are sometimes found declaring the State itself to be a creation of *jus gentium*: see e.g. Lessius, II, c. 5, *dub.* 1–3; Molina, II, d. 18, § 17 and d. 20; Gryphiander, *De civit. rec.* §§ 60sqq. But the *jus gentium* of which they spoke was for them identical with Natural Law, in the only form in which it could be applied to the real world. *The State as product of Jus gentium*

26. Melchior Kling (*Instit.* 1, 2, folio 1 verso) remarks in general terms that philosophers, in contradistinction to jurists, generally identify *jus naturale* with *jus gentium*. This is correct; for whole Oldendorp (op. cit. *tit.* 2–4) and Hemming both use the threefold division [of natural law, *jus gentium* and positive law], the later legal philosophers generally assume as their basis a simple distinction between natural and positive law. This is the case with Winkler (II, c. 9–10), though he proceeds to divide *jus naturale* into (*a*) *jus naturale primo* (III, c. 1 sq.) and (*b*) *jus naturale positivum*, i.e. *gentium jus* (IV, c. 1 sq.), and to contrast both with *jus positivum sive civile* (V, c. 1 sq.) See also Beneckendorf, *Repetitio et explicatio de regulis juris*, Frankfort on the Oder, 1593, pp. 81 sqq. *Distinction of Natural and Positive Law, with jus gentium disappearing*

The ecclesiastical legal philosophers almost always start from the antithesis of *lex naturalis* and *lex positiva*. But along with the former, they postulate the existence of *lex aeterna* or *divina*, which they rank as superior to or co-ordinate with it; and in the same way [as they distinguish two 'ideal' laws] they proceed to divide *lex positiva* into *jus humanum* [positive secular law] and *jus divinum positivum* [positive revealed law]: cf. Soto, lib. 1 and II; Gregorius de Valentia, qu. 3–8; Bolognetus, tr. 3–7, Suarez, lib. II–IV. We find a similar view in Melanchthon, lib. II–IV

Among the jurists we may note Donellus, who (1, c. 6) recognises only two

legislators—*natura ex naturale ratio* (and God as immanent in it), and *potestas civilis*. He accordingly identifies *jus gentium* and *jus naturale*, inasmuch as all *jus gentium* is simply *natura constitutum* (§§4–5), and, conversely, all *jus naturale* referring to mankind manifests itself as *jus gentium* (§§6–9). In the same sense Vultejus remarks (*Comm. in Instit.* 1, 2, pp. 12–41) that the threefold division is really only a twofold division into *jus naturale* and *jus civile*—*jus gentium* being only a species of the former. The same idea is expressed even more definitely by Althusius in *Dicaeologica*, 1, cc. 13–14 (and more particularly, as regards *jus gentium*, c. 13, nos. 18–20). Compare Salamonius, *In libr. Pand. jur. civil. Commentatio*, Basle, 1590, l. 1 D. 1, 1, fol. 6 sqq., Corasius on l. 1 D. 1, 1, Stryck, *Annotationes* to Lauterbach, *Coll.* 1, 1, p. 15. Political writers almost always use the simple distinction of natural and positive law.

Tendency to neglect Jus gentium

27. This [i.e. neglect of *jus gentium*, even though it is allowed to be one of the forms of law] is what we find in Bodin: in Book 1, c. 8, no. 107 he confines the absolute obligatory force of *jus gentium* to the cases in which it is in agreement with *jus naturale*. It also appears in Soto (who never touches on *jus gentium* until he reaches Book III, c. 1), Suarez (Book II), and other ecclesiastical legal philosophers. We find it even in the writers who seek to distinguish the natural-law from the positive-law elements in *jus gentium*, such as Molina (v, d. 69), Lessius (II, c. 2), and more especially Vasquez (cc. 27 and 31).

Grotius (1, c. 1, §§10–17) definitely assumes a simple bipartite division of law. Law is either *jus naturale*, resting on the *dictamen rectae rationis*, or *jus voluntarium*, depending on legislative will, and the latter is either *humanum* or *divinum*. As for *jus gentium*, it is a species of *jus humanum voluntarium*, it is the agreement of positive law as between all or a number of peoples; the Roman conception of *jus gentium naturale* has hardly any value (§11), natural law and positive law are confused in the Roman *jus gentium* (II, c. 8, §26).

28. It is only in this sense that we find *jus gentium* occurring in Hobbes.

The State based on pure Natural Law

29. The ecclesiastical legal philosophers are particularly insistent in holding (1) on the one hand, that the union of men in a state reader, the institution of the original sovereignty of the community over individuals, and the devolution of authority on a secular government, are all derived from *jus naturale* and therefore from God, and cannot be changed even by the *consensus totius orbis*, and (2) on the other hand, that the various constitutional forms have their basis in *jus humanum*. Cf. Soto, IV, qu. 4, art. 1; F. Victoria, *Rel.* III, nos. 1–8, Bellarmine, *De laicis*, cc. 5–6, Rossaeus, c. 1, §§1–3, Molina, II, *disp.* 22, 23, 26–7; Suarez, III, cc. 1–5; Claudius de Caron, 1, cc. 6 and 9–10. The same view is expressed by Arnisaeus, *Polit.* c. 2, *De rep.* c. 1, §§1–4, *De autor. princ.* c. 3. The basis of the State and its authority in pure Natural Law is assumed as self-evident by most of the champions of popular sovereignty: cf. Buchanan, pp. 11–13, [Beza's] *De jure magistr.* p. 4, qu. 6, p. 75, Danaeus, 1, cc. 3–4; Althusius, c. 1, §§30–9, Milton, the *Defence* of 1651, cc. 2–3 and 5. The absolutists are, however, no less definite in their appeal to divine and Natural Law: cf. Grauwenkel, c. 1 sqq.; Salmasius, cc. 2–3 and 5–6. Further details are given in the author's work on Althusius, pp. 65–8, 72 n. 41, 93 n. 48.

30. See vol. III of the author's *Das deutsche Genossenschaftsrecht*, pp. 611 sqq. [translated in *The Political Theories of the Middle Age*, pp. 75 sqq.] and his work on Althusius, pp. 279 sqq. and 365.

Natural Right

31. In particular, this idea [of a microcosmic sphere of natural rights] served to decide questions such as the obligatory force of constitutional laws,

the right of resistance (passive or active), and the rights of a people against a ruler who transgressed the bounds of his authority: cf. the author's work on Althusius, pp. 305sqq. 365 n. 95.

Natural Law as a political standard

32. We find legal philosophers and political writers energetically developing and applying the old theories, (1) that Natural Law, as the *dictamen rectae rationis*, was unalterable by any human power and even by God Himself, (2) that all positive law was derived from it, and could only add to or take away from it when place and time might require, and (3) that an enactment contrary to Natural Law was entirely null and void, and, per contra, an enactment was the more perfect, the more nearly it approached the Law of Nature. Cf. e.g. Soto, 1, qu. 4; Vasquez, c. 27; Gregorius de Valencia, II, d. 1, qu. 4, Bolognetus, c. 7; Molina, v, d. 68; Winkler, II, cc. 9–10, V, c. 1 sqq., [Bessa's] *De jure magistr.* sect. 4, qu. 2–3, Beneschendorf, op. cit. pp. 61 sqq.; Vultejus, *Instit.* 1, 2, pp. 37–44; Bodin, I, c. 8, no. 107 and II, c. 2; Althusius, *Dicaeologica*, I, c. 19, no. 9 sqq. and c. 14, *Polit.* Praef. and c. 1 [? c. xxxviii], §§ 128–9.

Many writers (e.g. Hotoman, *Instit.* 1, c. 2, pr.; Huchoven, *Instit.* 1, 2, § 1; and Winkler, V, c. 1) divided *jus* into *naturale* and *civile*, according as Natural Law was or was not included in it; but others contested even the bare possibility of a purely positive law: cf. Althusius, *Dicaeologica*, I, c. 14 (a law completely agreeing with Natural Law would not be *civile*, but a law with no element of Natural Law would not be *jus* at all), Ludwell, *Instit.* 1, 2, § 1.

33. Vultejus (*Instit.* 1, 2, § 11, p. 41 no. 6) expresses this idea in a particularly definite way: *jus naturale est ex utipro in recta ratione fundatum et immutabile ... civile est immutabile in totum, a quo civitatum populum recedit, et ad ipsum redundat, quae rei commodum, ut, in diversis ad ipsum ratio, ad ipsum non pertinentur.*

34. See the author's work on Althusius, pp. 69 sqq. and 398.

Respublica and Civitas

35. Bodin, I, c. 1, no. 1, gives the definition, *Respublica est familiarum rerumque inter ipsas communarum summa potestate ac ratione moderata multitudo*. The definition of Gregorius (1, 1, § 6) is more detailed: *Respublica est rerum et ratione gaudentium communitas totius societatis, quae efficit unum quoddam corpus civile ex pluribus domibus et membris compositum, sub una potestate suprema solata, sub uno capite et uno spiritu, ad bonum et commodum omnibus in hac mortali vita, utque familiae ad externum pertinentur.* Cf. also Althusius, *Polit.* c. 9, Hotomanus, I, § 3; Kirchner, I, § 3; Keckermann, *Praecogn.* p. 7; Konig, *Theatrum pol.* 1, c. 1; Winkler, V, c. 4, Sparer, III, c. 1, Grotius, II, c. 9, §§ 3, cf. 1, c. 3, §§ 4–6, II, c. 15, §§ 3, III, c. 20, §§ 3–4, Berckringer, 1, c. 4; Boehmer, I, c. 2, § 1.

Often a distinction is drawn between *Civitas* and *Respublica*, which are said to be related as *materia* and *forma*, or as *subjectum* and *finis*, or as body and soul. The *Civitas* thus becomes merely the group or community which is the basis of the State, while the *Respublica* is the constitution of that group; and on this basis the *Civitas* is defined as a body of persons, and the *Respublica* as an order of relations (as *ordo subsidiorum* or *parentum*, or some such phrase)—the idea of *majestas* being then connected with the former, and that of *summa potestas* with the latter. The distinction is particularly emphasized in Arnisaeus, *Polit.* cc. 6 and 7, *De rep.* 1 *potestate*, §§ 4 sqq., I, c. 5, 2, 3, II, c. 1, 2, 1; see also Besold, *Princ. de finit. pol. doctr.* Dis. 1, c. 3, §§ 1–3 and c. 8; Knipschildt, *De Cis. imp.* 1, c. 1; Schönborner, 1, c. 4, Werdenhagen, II, cc. 1 and 3; Berckringer, cc. 1 and 4.

36. Altusius expressly makes the chief task of politics consist in the

n of the nature and authority of majestas; cf. his prefaces (in the author's work on Althusius, pp. 18–20).

Sovereignty

37. On the history of the conception of sovereignty see the author's work on Althusius, Part II, c. V and pp. 351 sq., with the works there cited by Hancke, Weill, Dunning, Dock, Merriam, Rehm and Jellinek; and also Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften* (Berlin, 1889), pp. 106 sqq. [See also the exhaustive analysis of the conception to do in Bigne de Villeneuve, *Traité général de l'État*, vol. I.]

38. References for all these points may be found in the author's work on Althusius, pp. 151–8, 169–78 and 351 sqq. [Gierke also refers to the notes on pp. 213–13, 218–19 and 220–3 of the fourth volume of his *Genossenschaftsrecht*, in a section not here translated.]

39. See the author's work on Althusius, pp. 143 sqq.

Classification of States

40. The classification of forms of the State of course assumed a far greater importance when the Ruler was the 'Subject' or owner of Sovereignty than when he only *exercised* a sovereignty which always and everywhere belonged to the People; and indeed a strict interpretation of popular sovereignty reduced the classification of forms of the State into a mere classification of forms of government. Althusius was the first to express this consequence definitely; and he deals with classification only at the end of his *Politica* (c. 39), in expounding a theory of the *foedus inter magistratum* see the author's work on Althusius, p. 95; and see also Buchanan, p. 20, and Milton, *The Tenure of Kings and Magistrates*.

The second Constitution: opponents and advocates

41. This explains why we find opponents of the conception of the *forma mixta* not only among (1) the advocates of the sovereignty of the Ruler, but also among (2) the devotees of popular sovereignty and (3) those of 'double sovereignty'. The opponents of the first kind are e.g. Bodin, II, c. 1, nos. 174–8, c. 7, no. 254; Grotius, V, c. 1, §3; Barclay, V, c. 10; Bornitius, *Part.* pp. 46 sqq. and 102 sqq.; Reinkingk, I, cl. II, c. 2, nos. 231 sqq. and cl. 5, c. 6; Gousewinkel, c. 6; Hobbes, *De cive*, c. 7, *Leviathan*, c. 19. The opponents of the second kind are Althusius, c. 39; Hontomius, II, §42. Opponents of the third kind are Kirchner, III, §7, litt. e, Alsted, pp. 69 sqq., Arumaeus, I, no. 1, Otto, *Diss. an mutat. detur republicae status*, in Arumaeus, II, no. 22; Brauniacht, III, c. 2, §10; Cubach, Brunsdorff, Hilliger, Konings, Schlieffer. [Gierke also refers to a note on p. 219 of the fourth volume of the *Genossenschaftsrecht*, in a section not here translated.] Conversely, the mixed form receives the adhesion not only (1) of some of the advocates of popular sovereignty (such as Hotoman, *Franogallia*, c. 12, and Danaeus, I, c. 6), and (2) of advocates of 'double sovereignty' (e.g. Besold, *De statu rep. mixto*, c. 2, Frantzkius, *De statu rep. mixto*, in Arumaeus, III, no. 27 and IV, no. 41, §§60 sqq.; Tubben, II, cc. 16–17, Berckringer, I, c. 12, §§15–21; Werdenhagen, II, c. 25; Liebenthal, d. VIII, qu. 1; Pufendorf; Lampadius, Carpzov) [Gierke also refers to pp. 218 sqq. of the fourth volume of the *Genossenschaftsrecht*, in a section not here translated]; but also (3) of many of the advocates of the sovereignty of the Ruler. Examples of this last class are Molina, II, *disp.* 23; Suarez, III, c. 4, no. 5 and c. 19, no. 6, IV, c. 17, no. 4, Albergati, I, cc. 8 sqq., pp. 151 sqq.; Arumaeus, *Polit.* c. 8, *De jure maj.* II, cc. 1 and 6, *De rep.* II, c. 6, I. 1 and 1. 5 §§1–134, II, c. 1, §1, *De succ.* c. 1, §§4 sqq., Boehm, II, c. 6, Kruptschildt, I, c. 8, nos. 61–3; Kachermann, II, cc. 4–6; Hedor, pp. 98 sqq.; Schonborner, I, c. 16; Fehringer, *Diss.* pp. 147–84. [a reference is also added to other writers cited in a note on

p. 222 of the fourth volume of the *Gesammelte Werke*]. A similar view occurs in Grotius, 1, c. 3, §§ 17–20, c. 4, § 19.

It should be added, however, that the conception of the mixed constitution has obviously a different significance, according as the right of the Ruler which is held to be divisible among a number of different 'Subjects' is regarded as (*a*) the one and only form of Sovereignty, or (*b*) merely a *superior personalis*, or (*c*) a simple 'magistracy'.

The absolutist view of democracy, as equally compatible with monarchy

48. Cf. Bodin, II, c. 1; F. Victoria, *Rel.* III, no. 10 (there is the same *potestas* and the same *libertas* in every form of State, whether *unus* or *plures* be the 'Subject' of sovereignty); Grassmuhl, c. 11 (whether the ruling authority be *persona unum* or *corpora unum*,* the same theory is applicable in regard to *superiorem* and *obedientia*, and there *erga a Deo*); Arnisaeus, *Polit.* c. 11, *De jure mag.* 1, c. 8, *De rep.* II, c. 7, n. 9; Claudius de Caran, 1, c. 10; Hobbes, *De cive*, c. 7, §§ 7 and 9, c. 10, *Leviathan*, cc. 18–19.

Those who maintained, in regard to monarchy, the principle that the king was superior not only to all the members of the community as individuals, but also to the community itself as a whole, were logically compelled to admit the corresponding principle in regard to democracy—that the governing community of the People was superior not only to individuals, but also to the whole body of the governed. In doing so, they allowed the conception of the sovereign Whole to transform itself into that of the majority [i.e. they regarded the majority, rather than the whole community of the people, as superior to the body of the governed]; but failure to analyse their conceptions adequately enabled them to avoid the paradoxical conclusion, which thus involved, that the majority had a greater authority than all the members taken together. Thus we find Bodin saying of the *populaire estat* (II, c. 7), *Cum unicuique, aut saltem pari cuique, caeteris omnibus non datum imperitare, sed etiam simul concurrunt et collecta, superiorem jus habent.* Other thinkers, in dealing with democracy, tacitly dropped the distinction between the sovereign community and the whole body of the governed [or, as Rousseau expressed it, between the people as *souverain* and the people as *état*], and simply spoke of the authority of the *populus universus* over *omnes et singulos*. Boroutius (*Pert.* p. 51) expressly remarks that in a democracy the sovereign *unus, collective unus*, only governs *singuli*, for *exercitio non potest* [*imperare*]. Hobbes was the first thinker who was able, without self-contradiction, to reject the view that in a democracy there was a personality of the people [as a governed body] which was distinct from the collective person of the people as Ruler, and he was able to do so because, in every form of State, he regarded the people as being, in relation to the Ruler, a mere sum of 'dissolute' individuals (cf. *De cive*, c. 6, §§ 13 and 17, c. 7, §§ 5–7, c. 12, § 8, *Leviathan*, c. 18).

The problem of the People as Ruler and the People as ruled

49. Thus Beauld (*De imp.* 1, c. 1, § 5) ascribes to the popular assembly in a democracy, acting by majority-vote, only a *superior personalis*, while he assigns to the community of the citizens a *superior realis*, and he consequently draws the conclusion that unanimity is required for constitutional changes and for any regulations which relate to the State itself. Doctorus of Tuldea (1, cc. 11 and 12) takes the same line. The advocates of a 'double sovereignty', who distinguished between *superior realis* and *personalis* even in treating of democracy, were theoretically bound to assume two different forms of the

* *Persona unus* = one in the sense of possessing a single legal personality (though several physical persons may unite to constitute that single personality). *corpora unum* = one in the sense of being a single physical person.

sovereign community of the People. Similarly, too, in the pure theory of popular sovereignty, the sovereign People [which is ultimately supreme in *all* forms of State] cannot be logically identified with the People which is instituted as the Ruling authority in a democracy. Even the advocates of the sovereignty of the Ruler, if they pushed the doctrine of a contract of submission [i.e. of a contract of government] to its logical conclusion, were bound to distinguish, as the two separate parties involved in this contract when a democracy was in question, (1) the originally sovereign People, and (2) the sovereign popular assembly deciding by majority-vote [to which the originally sovereign People had submitted itself by contract]: cf. Victoria, III, nos. 1, 6–8, Soto, IV, qu. 1, a. 1, Molina, II, d. 23, § 10, Fridemreich, c. 18.

It was impossible, however, to take these distinctions seriously without being involved in contradictions. Thinkers began by arguing, where other forms of State than democracy were concerned, that both the original rights of the People and those of its rights which still remained in action after the institution of the Ruler belonged to the same assembly—the assembly of all the members of the State—deciding as a unanimus by majority-vote. Then, as soon as democracy was in question, they made a sudden *salto-fine*, and required unanimity [i.e. they claimed that the sovereign People, when exercising its original rights, must be unanimous, though they allowed that the popular assembly, when exercising the rights which it acquired by being instituted as Ruler, might decide by majority-vote.] This was an entirely arbitrary procedure; and yet without it the distinction of the two forms of the popular community remained without any practical significance. Many thinkers, accordingly, dropped any idea of a contract of submission [between the sovereign People and the popular assembly] in dealing with democracy, and substituted for it a special resolution of the sovereign People to retain its sovereignty: this is the line taken by Suarez, III, c. 4, nos. 1, 5–6, 11. Others, again, substituted [in lieu of a contract between the sovereign People and the popular assembly] a contract between the People and the governing body of the Republic, thereby abolishing any clear logical distinction between a Monarchy and a Republic. This is the line taken by Althusius (c. 39) while describing the People as itself the *summus magistratus* in a democracy, he nevertheless assumes a contractual relation between the People and its officials and ephors, cf. Rousseau, c. 1, § 2, and Milton, *Defensio* of 1651, c. 6. The majority of thinkers were altogether silent on this difficult question. Hobbes, however (loc. cit.), saw clearly this weak spot in the armour of the doctrine of popular rights, and he used the inherent self-contradiction of the view that in a democracy the People must be superior to the People in order to refute entirely the idea that a popular community, as distinct from its Ruler, could have any sovereignty at all, whether in the way of original rights or of rights that still remained in action after the Ruler's institution.

44. See the author's work on Althusius, pp. 143 sqq. and 356.

45. Op. cit. pp. 85, 91 and 341.

Monarchy and Republic as the two types

46. In this connection the three basic forms of government distinguished by Aristotle [the One, the Few and the Many] continued to be generally recognised; but there was an increasing tendency to unite with Aristotle's threefold division a logical distinction of governments into the two forms of Monarchy and the Republic—aristocracy and democracy being then taken together as forms of State with a collective government [i.e. government by

more than One]. Cf. Althusius, c. 39, Victoria, *Rel.* III, no. 10 (*unus vel plures*); Bornitius, *Pert.* p. 45 (*regnator unus ut semper τῷ λόγῳ, interdum etiam persona, interdum multitudo*[*]), Keckermann, *Polit.* II, c. 1, Arnisaeus, *De jure maj.* 1, c. 2, *Polit.* c. 11 (the sovereign is *unus* either *natura*, or *comprehensive et analogice*); Grotius, 1, c. 3, § 7 (*persona una plurave*), Boerius, 1, c. 3, § 4 (*unus vel plures*); Borckringius, 1, c. 4, § 10 (*unum numero vel analogice*), Grauswinkel, c. 11 (*persona unum or corpora unum*), Hobbes, *De cive*, c. 3, § 7 and c. 7, *Leviathan*, c. 17 (*unus homo vel coetus*). Althusius, Bornitius, Keckermann, Besold (*De Arist.* c. 1), Tolden (II, c. 12) and other writers use the technical expressions 'Monarchy' and 'Polyarchy'.

47. The believers in a mixed constitution regarded a division of the right of government as possible; and conversely the indivisibility of governing authority served their opponents as the chief ground for rejecting such a form of State. Both allowed that other 'Subjects' (and, more particularly, assemblies of the Estates in a monarchy) might participate to some degree in the exercise of the right of government. But believers in the mixed constitution—assuming that States in which the right of government was constitutionally limited could co-exist with absolute States—asserted the possibility of an *independent* right to participate in the exercise of State-authority, while their opponents—refusing to allow any binding force to a constitutional limitation of the Ruler—treated any modification of governing authority by the co-operation of other factors as only a variation under the mode of government (*ratio gubernandi* or *forma gubernandi*). *Mixed and limited constitutions*

Most of the advocates of the mixed form (cf. supra, n. 41) recognised in addition the merely 'limited' form of government (e.g. Molina, II, d. 93, Suarez, III, c. 4, no. 5, c. 9, no. 4, IV, c. 17, no. 4, Keckermann, I, c. 33, II, cc. 4–6, Herder, pp. 98 sqq., Bornitius, II, cc. 6–7, Grotius, 1, c. 3, §§ 16–18), but there were some of them who thought that while division of sovereignty was conceivable, limitation was not (Arnisaeus, *De jure maj.* 1, c. 6, *De rep.* II, c. 9, n. 5). Even the opponents of the mixed constitution (supra, n. 41)—not only those who advocate popular sovereignty and 'double sovereignty', but also many of those who advocate the sovereignty of the Ruler—are willing to accept the idea of limited government, and to defend, in so many words, the inviolability of constitutional limitations on the right of the Ruler (Bornitius, *Pert.* 43, *De maj.* c. 13, Frederwech, cc. 18 and 29). On the other hand the thorough-going absolutists reject the limited form no less than the mixed (Bodin, I, c. 8, nos. 85–99, Gregorius, I, c. 1, § 9, xxiv, n. 7; Barclay, Grauswinkel, cc. 3, 4, 6, 11, Hobbes, Salmasius, c. 7).

48. Cf. the author's *Allmacht*, pp. 80 sqq. and 341. The fact that Arnisaeus (op. cit. p. 81 n. 19) and Grotius (op. cit. n. 20) recognise other grounds [in addition to delegation by the people] for the separation of the rights of government, or again that Grauswinkel (c. 2) rejects the contract of government altogether, hardly weighs in the balance against the general trend of Contractarian theory.

49. Op. cit. p. 85, n. 30.

50. Op. cit. p. 85 n. 32.

51. The identity of the people as it now stands with the people as it originally existed was used to explain why a contract of government assigned to a primitive past was obligatory upon the present generation. In defence *The People identical through the generations of its life*

* "The 'Subject' of Sovereignty is always theoretically one, sometimes it may also actually be one person, but sometimes it may be composed of many."

of this identity we find an appeal expressly made to the principles of the [Roman-law] theory of Corporations in regard to the continuous existence of the *universitas* through all the changes of its members. cf. especially Junius Brutus [the author of the *Vindiciae contra Tyrannos*], qu. III, pp. 171 sqq.; but cf. also Althusius, c. 19, §§ 74 sqq., c. 9, § 16, c. 38, §§ 63 sqq., and Victoria, *Rel.* III, no. 11. Grotius uses the same idea (II, c. 5, § 31), extending it to cover cases of the forfeiture of *imperium* by delict or in war—*quia nascitur personam non ipsius quatenus unus ex populo*; cf. also III, c. 9, § 9.

The People as a Corporate Body

58. According to the *Vindiciae contra Tyrannos* the people, as a *universitas* which *totam personam nunquam mutat*, (1) acting in conjunction with the King, concludes a covenant with God (qu. II, p. 75), and (2) acting by itself, concludes a covenant with the King (qu. III, pp. 131 sqq. and 248 sqq.). Now since *universitas nunquam moritur*, and no prescription runs against it (qu. III, pp. 170–1), the people continues to possess inviolable rights and duties in virtue of both these covenants. (1) It is responsible to God, as *servus debitor* [or *pactum debitor*] with the King, for the well-being of the Church, and it makes itself liable to divine punishment by tolerating godless magistrates, while according to the rule *quod universitas debet, singuli non debent*, the *principes* of the people *in foedere cum Deo non tenentur* (qu. II, pp. 76, 84 sqq. and 119). (2) Again, in regard to the King, the people, as a *universitas*, has a higher authority, and in the event of his becoming a tyrant it has the right and duty of resistance and deposition (qu. III, pp. 144 sqq. and 292 sqq.), while *singuli principes* are in no way called upon to take such action (Ibid. pp. 319 sqq.).

Althusius brings the popular community, as a *universitas publica universalis*, entirely under the category of the *universitas* (*Polit.* c. 9 sq.). He ascribes to the *corpus consociatum*—the *totum corpus consociationis*, or *universitas populi*—inalienable sovereignty, the ownership of State-property, and the rights belonging to an employer in regard to all officers vested with public powers of administration, while, clinging in justification the [Roman-law] theory of corporations, he excludes individuals from the enjoyment of all these rights (Praef. pp. 9, 17, 18, 19, 38). See also Buchanan, pp. 16 sqq. and 78; Hotoman, *Franogallia*, cc. 6–9 and 14; Rossaeus, c. 1, §§ 2–3; Mariana, I, c. 8; Marius Salamonius, *De princ.* I, pp. 19–20.

58. See, for example, Peurmeister, I, c. 17; Bortius, c. 6, § 2; Resold, *De maj.* sect. 1, c. 1, § 4 (*corpus*) and § 7 (*post universitatem populi*); Lancaeus, *Cap. mag.* p. 352.

The use of the theory of Corporations in Grotius

59. Grotius employs the conception of the *universitas* and the principles of the [Roman-law] theory of corporations (1) in dealing with the contractual devolution or transference of supreme authority by the people (I, c. 3, § 13; II, c. 5, § 31, c. 14, §§ 2 and 10; III, c. 8), (2) in his account of delicts of the people and its responsibility for the delicts of its members (II, c. 21), (3) in regard to the question of the obligation of the people by the acts of the king (II, c. 14, § 10), (4) in justifying reprisals under international law (III, c. 2) and the taking of prizes (III, c. 6, § 8), and also in other respects.

And in ecclesiastical writers

60. See Victoria, VI, no. 8, Vasquez, c. 47; Soto, IV, qu. 4, a. 1–2 (the people as *corpus*), Molina, II, *disp.* 25, Suarez, III, cc. 2–3 (the people as *communitas*, *corpus mysticum*, *corpus politicum*, originally possesses and transfers the supreme authority). See also Pruckmann, pp. 90 sqq. (contract with the *universitas* or *communitas*), p. 111, note 25 sqq.; Bordoni, I, c. 2, § 1 (*corpus mediatum*); Bunus, I, c. 3, § 3 (*universitas repraesentat totum Regnum cuiusve summo imperio constituto*).

56. See Bodin, 1, c. 8, nos. 85–99, Gregorius, 1, 1, §§6–7 (*unum corpus mixtum* according to), 90, D. 41, 3 and I. 1, § 1, D. 3, 4); Knipschildt, v, c. 1, nos. 3–4.

57. The people united in a State is described as a *societas civilis*, naturally developed by the extension and perfection of the Family, in the following writers: Gregorius, 1, c. 1, §6 and c. 2, §§1–6 (*societas, quae natura constituit*), xxx, c. 109; *Aristoteles, De rep.* 1, c. 3, n. 4 and 9. 5, *Polit.* c. 6 (the *civitas* is a *societas*, the *civis* is a *socius*), Besold, *Dess.* 1, c. 3 (*societas civilis*, which is also *naturae consentanea, in qua genus humanum vivit*), Kirchner, *Disp.* 1, §3 (*societas politica, legitima civilis potestatis imperio civitas*); Kickermann, pp. 12 sqq., Fridericich, c. 8 (growth from *consociationes domusticae*, like a many-branched tree from its roots) and c. 10; Schomberner, 1, c. 4, Gruger, *Disp.* 1, Heider, pp. 25 sqq., Wordenhagen, 11, cc. 1–9 (the *populus* is a *societas civilis*); Tulden, 1, c. 5 (*societas civilis*, which arose *ex naturae instructu*), and c. 6 (the *finis reipublicae* is *societatis civilis tuitio atque cultura*), Coering (*societas civilis*, with *imperium*), Knipschildt, 1, cc. 1 and 6, and many other writers.

A *societas civilis* founded by a union of men originally living in isolation is the basis adopted by Buchanan, pp. 11 sqq., Marsilius, 1, c. 1, Rousseau, c. 1, § 1, Boucher, cc. 10 sqq., Hoenonius, 1, §§4 sqq., Winkler, 1, c. 10, 11, cc. 9–10, v, c. 3 (*multitudo sese constituit*, and thus produces *societas civilis*), cf. the description of the State as *societas civilis et salutaris* in Velsternus, dec. 2–3, and in Matthias, *Coll.* *disp.* 4–5 and *Spec.* pp. 20 sqq. The treatment of the community of the people as a contractually created 'society' is carried into greater detail by Salamonius, 1, pp. 35 sqq. and 38–42, and by Parmenter, 1, c. 17, nos. 3 sqq. (the *societas* formed by *mutua consensus*), c. 9, no. 10 (*societas et libera consensus*), c. 30, nos. 1–5 (the ending of such *societas* by *contrario consensu*).

Althusius, who is the first to develop a formal theory of the social contract as constituting the State, interprets the State throughout (like all other corporate bodies) as a *consociatio* or *societas* (*Polit.* cc. 1–9, *Dicaeolog.* 1, cc. 8, 32, 78 and 81). Grotius constantly applies the conception of *consociatio* or *societas* to the political community (*Prolog.* cc. 15–16, 1, c. 1, § 14, 11, c. 5, §§17, 23, 24, 11, c. 6, §§14 sqq., III, c. 2, §6, c. 10, §§7–8).

58. Cf. the author's *Althusius*, p. 94 n. 51, p. 96 n. 59, p. 98 n. 63, p. 100 n. 68. Schomberner, 1, c. 4, definitely says, *Civitas reipublicae est in personam coalescentes et coniungentibus, ratione mutuae affectionis civitatis.*

59. Cf. the author's *Althusius*, pp. 96 sqq.

60. Thus, according to Molina (II, d. 22, §§8–9), *societas politica* arises from the union of originally independent individuals, but because the natural reason given by God impels them thereto, there results *ex jure, quod homines ad integrandam unam corpus Reipublicae consensunt, jure naturali, et ne a Deo immediate, potestas corporis totius Reipublicae in singulos partes, ad eos gubernandos, ad legis illis ferendam, et ad eos punendos.* The *homines consentientes*, because they are *partes*, are a *conditio sine qua non* of the authority thus resulting, but they are not its creators; otherwise it would be impossible to explain why the community has a right of life and death, while no individual has such a right over himself. Moreover, *longe diversa fit potestas, quae ex natura rei consurgit in Republica, a collectione potestatum singularum, et quae a Republica* and a *Republica* does not hold its power *quatenus singularum, sed quatenus a Deo.*[*]

The People described as a societas

The theory of the Rights of the People in the theologians

[*] The theory of the theologians may be illustrated from the analogy of marriage. The agreement of husband and wife is necessary to the existence of marriage. But

Suarez (III, cc. 1–3) argues still more emphatically that, inasmuch as man is born free and subject to no human power, the *perfecta communitas* only arises in consequence of the *mutuaeus humanae voluntatis*, and indeed *per voluntatem* [illegible] *qui in illa consentiunt*; but at the same time, man being by nature *sociabilis*, this agreement of union corresponds in his case to the demands of natural reason. Moreover, although the community itself *existens sui* [illegible] *et potestatis regulativae*, the *authority* which it possesses is not acquired directly from the rulers, who did not previously possess any such power, and least of all any right of life and death, nor is such authority acquired directly from God; it is derived *ex ipsa natura*, as a *propriae consequens natura* which God has willed, and therefore it follows that individuals, though they are creators of the *corpus politicum*, are not the source of the authority of that body over itself and its members.

See also Dedicus Covarruvias, *Pract.* qu. 1, cc. 1 and 4 (society really is formed *lege naturali*, and by the same law it possesses all authority, which it proceeds to devolve upon a ruler). Soto, I, qu. 1, a. 3 and IV, qu. 4, a. 1–2 (God, *per legem naturalem*, gave individuals a right of self-preservation, and with it—because self-preservation is impossible in isolation—an instinct for society, and thus He gave the congregate *Republica* authority over itself and its members). Victoria, III, nos. 4–8, Bellarmine, *De laicis*, cc. 3–6, Claudius de Carran, I, c. 9.

Suarez on the origin of sovereignty

61. Suarez (III, c. 3, nos. 6–7) compares the sovereignty of the *corpus politicum* in question with the liberty of the individual person. In both cases there is an authority over the self and its own members—an authority which is necessarily given with and by the fact of existence. Now as the child receives its existence from its father, but its liberty from God, in virtue of Natural Law, *sic haec potestas datur communitati hominum ab auctore naturae, non tamen sine interposita voluntatis et consensus hominum, ex quibus talis communitas perfecta congregata est.* As the father can beget or not beget the child, but if he begets it can only beget it as a free being, so it only needs a human will directed to that end to bring the community unto existence, but *sic illa communitas habet potestatem producendi, non ad necessaria ejusdem voluntas hominum, sed ex natura ita consequitur et ex providentia auctoris naturae.* Just because they are not inherent in the nature of either, the sovereignty of the community and the liberty of the individual are both alike alienable and transferable. See the author's *Ethics*, p. 67.

The theologian really makes the community an aggregate of individuals

62. Such a view is already implied in the argument, that sovereignty must originally belong to the community because there is no discoverable reason why it should belong to one person rather than another. cf. Victoria, op. cit. no. 7, Bellarmine, op. cit., Molina, d. 31, Suarez, III, c. 2, nos. 1–4. But it appears more explicitly in the further conception, that the community is driven by the nature of things to transfer its original authority to a ruler because it cannot, as a multitude, exercise that authority itself. cf. Victoria, op. cit. no. 8, Bellarmine, op. cit. (where it is definitely said that supreme authority *immediate insidet in subjecto in toto multitudine sui*, but is transferred by this multitude). Soto argues in the same sense, IV, qu. 1, a. 1.

A similar line is adopted by Molina (d. c. 23). While describing the sove-

it does not explain, or create, the institution of marriage. The institution is an inherent part of the divine scheme, and the agreement of the parties is simply an agreement to fit themselves into that scheme, which exists *per se* apart from their agreement.

reignty of the people as the authority of a *body* over its members, he none the less takes the *totum corpus* to be the [sole] sum of all, and he depicts the transference of authority to a Ruler as a command of Natural Law, inasmuch as otherwise [i.e. if the transference were not made] all would be constantly obliged to act in unison and by unanimity.

Even Suarez, in spite of the emphasis which he attaches to the corporate nature of the unity of the people, cannot transcend the conception of that unity as a mere collection of all its members. He describes the *humanum collectum* (III, c. 9, no. 5), or the *totum commune* (ibid. no. 4), as the original 'Subject' of supreme authority, and he contents himself with adding that *multitudo hominum dupliciter considerari potest* (1) *uno modo, ut est aggregatum quoddam non ullo ordine vel nexu physico vel morali* . . . (2) *alio modo, quatenus spontaneo voluntatis suae consensu conveniunt in unum corpus politicum congregantur inter sectantes quasdam et ut mutuo se juvent in ordine ad unum finem politicum, quo modo efficiunt unum corpus mysticum, quod verissime dici potest per se unum.* He argues that it is only in this second mode or sense that the community is the 'Subject' of a *summa potestas, cui magis dici communitatem perfectam licuerit*, in the first sense or mode it only possesses such authority, at the most, *radicaliter* (III, c. 2, no. 4, cf. II, c. 3, nos. 1 and 6—*multitudo collecta non aggregatum* as distinct from *corpus mysticum*).*

68. In Buchanan (pp. 11 sqq.), Mariana (I, c. 1), Rousseau (c. 1, § 1), Boucher (cc. 7 sqq.) and Fauconnet (I, c. 17, nos. 3 sqq.), the authority of the State is regarded as proceeding merely from the social union of free and equal individuals who originally lived in isolation. Althusius (*Polit.* cc. 1 sqq.) ascribes the rights of all associations to a *communicatio status* in things, services and rights which are useful and necessary for social life. Grotius (II, c. 5, §§ 17 sqq. and c. 20, III, c. 8, § 6) derives the rights of the State, including the power of punishment, entirely from the original rights of individuals. Milton (*The Tenure*, pp. 8–10) considers the authority of the State as the product of a contract of society formed among men who are naturally born free, 'this authority and power of self-defence and preservation being originally and naturally in every one of them, and unitedly in them all'. See the author's work on Althusius, pp. 105 sqq., 344 sqq.

The authority of the State as a sum of individual rights

64. A typical example of this conception is the way in which Salmonarius (pp. 35–42) attempts to prove that *populus sine legibus ligatur*, although nobody can be *superior* and *obedire* at the same time, and nobody can be *sibi posterior*. In reality, he argues, each law is a contract, and the people is a contractually united body of persons. The very beginning of the *contractus*, as a *mutuus consensus*, already implies binding contracts, and therefore laws. It is all a question, not of the obligation of the people to itself, but of mutual obligation between the individual members of the people—*societas non sibi obligatur, sed ipsa inter se socii*; and the Ruler, who occupies the position of *propositus* or *iudex* in the *societas*, is no less bound than the other members. Cf. Milton's phrase (op. cit. p. 6), 'a common league to bind each other from mutual injury'.

Salmonarius on the State as a sum of contractual obligations

* Here again (cf. the translator's note appended to note 60), the theory of the theologians seems really to be higher than Gierke allows. The consenting parties who are necessary to the existence of a political society (just as they are necessary to the institution of marriage) may be, as such, only an aggregate. But the unitness which emerges from their act of agreement as a number of individuals is a part of the divine scheme, and is a true 'mystical body' in that scheme. The distinction is fundamental, and if we accept it the State is really a *corpus*.

*Althusius on the State as a * partnership*

65. Althusius identifies the body politic (*corpus symbioticum*) with the contractual community of the members of the people (*consociatio symbiotica universalis*): he bases all the rights of governing authority on the obligation, incurred in and by the contract of society, to participate in a *communicatio* of material and spiritual benefits and means of action; and he ascribes to the government only the position of 'administrator' of such matters as are the objects of the *communicatio*. Cf. *Polit.* cc. 9 sqq.; *Dicaeologica*, 1, c. 81; and the author's work on Althusius, pp. 21 sqq.

The State in Grotius partly a Corporation partly a partnership

66. Cf. Grotius (II, c. 3, §23): *reservatio, quae multis pactis furtivis in usum populum et multitudinem venit, necnequam dari per corpus in partes, quae hoc perfectionem sui accipiunt, neque alia ut ante homines externos, quae non ad hoc accidunt aut per se spectat aut ex consentientes spectare putat.* In §24 he argues that the individual is entitled by Natural Law to terminate his membership [of the State]; but just as in the *societas privata* of Roman law a member cannot quit if his leaving affects the society, so here he can only quit on conditions of paying in ready money his share of any debt with which the State may be burdened, or of providing an *idemnis* in lieu of himself if the State be engaged in war: moreover departure is often forbidden by positive law, and a *pactum ne exeam* is valid. In III, c. 20, §§ 7–8, he argues that it follows from the act of consent, implied in entry into civil society, that no sacrifices may be sacrificed for the sake of *publica salutis* in the event of the conclusion of a peace-treaty, but it equally follows, he adds, that individuals have a claim to compensation for war-losses from the means at the disposal of the community. The reason is that, though the infliction of injury and loss on an external enemy is lawful in war, *erat vitio in hoc non, si aequum est ut communis hostem damna quae mortalis causa contingunt.* But positive law may ordain, none the less, *ut ne detis omnino nulla adversus societatem ulcisci ut, ut res quoque ordinet defendat.*

The People as a Unit, or a Collection of units

67. For Althusius the sovereign People is identical with the *consociatio multitudo*, with *homines coniuncti*, *consortes et coharentes*, with the *universa membra conjunctim*, with the *populus universus*, with the *consociatio universalis*; with the *totum corpus* (*Polit. Praef.*, cc. 9 and 17, *Dicaeologica*, 1, cc. 7–8.) Similarly the author of the *Vindiciae contra Tyrannos* identifies the sovereign with the *popularis congregatio non dissoluta*, the *universitas*, or the *universa multitudo* (qu. II, pp. 73, 89 sqq., 91 sqq., 114; qu. III, pp. 149, 171 sqq., 297 sqq.). To Buchanan, the sovereign is the *universus populus* (pp. 16, 30, 48, 78–80, 87); to Hotoman, it is the *universus populus* or *universitas* (*Franco-Gallia*, cc. 5–9 and 19); to Danaeus, the *subditi* or *populus universus* (I, c. 4, pp. 36–44, III, c. 6, pp. 217 sqq.), to Boucher, the *multitudo pro sacta*, which must not be confused with the *concilia et conjuratio turba* (I, c. 9); to Mariana, the *universitas* (I, c. 8), to Salamonius, the *multitudo hominum* or *universitas* (I, pp. 20, 56), to Rousseau, the *universitas* (I, c. 2, §17); to Hoenonius, the *universitas*, or *populus universus*, or *populus totidem curiatim conjunctus* or *curiatim collectus* (II, §§46, 51; III, §5); to Milton, 'all as united together' (*The Tenure*, p. 9).

In the same way supreme rights is ascribed by Kirchner to the *senatus populi sociatus* (II, §1); by Pufendorf, to the *popularis universitas* (I, c. 17), by Berckringer, to the *popularis universitas*...*collective*—but also, at the same time, to the *singuli* as members of this collective body (I, c. 4, §§6–8), by Altenius, to the *subditi universi*, (p. 18), by Wordenhagen, to the people as *collectivum quid*, possessed of quantitative and qualitative attributes (II, c. 6). Similarly, again, we find the 'Subject' of original sovereignty, and of the popular rights which persist after the alienation of that sovereignty, described in

Soto as the *multitude collected simply* or the *populus congregatus* (I, qu. 1, a. 3, qu. 7, a. 3; IV, qu. 4, a. 1–2); in Victoria, as the *multitude or unity united* (III, nos. 8, 15); in Bellarmine, as the *totis multitudo* (cf. n. 62 supra); in Molina, as the sum of all (II, d. 22–3, 25, III, d. 6), in Suarez, as the *hominum collecto* or *multitudo* (cf. n. 62 supra). Grotius too regards the *universitas* as consisting only of *singuli quique congregati vel in numerum redacti* (II, c. 21, § 7); and Keckermann describes the people as *collectum quid seductum* (*Praecogn.* p. 7).

68. The advocates of the theory of popular sovereignty, like those of the theory of 'double sovereignty', expressly emphasize the fact that the Ruler is superior to his subjects *ut singuli*, but inferior to them *ut universi*. Cf. the *Vind. contra Tyr.* qu. II, pp. 91 sqq., qu. III, pp. 390 sqq.; Buchanan, pp. 79–80 (the king is to *singuli*, as the people is to the king), Salmasius, I, p. 20 (the king is *major singulis, sed minor universis*, as being the *unus universitatis*, but *not* the *singularum summus*) and p. 28; Rousseau, c. 2, § 11; Duncan, III, c. 6, pp. 215 sqq.; Althusius, c. 9, § 18 (*non singulis, sed universitas universi maiores et ita corpori consortis regis completi*); Hotmanus, II, § 46 (*universi*, not *singuli*, are the *Superiores*), Alsedius, p. 18 (*superior singulis, inferior subditis universis*) and pp. 56 sqq.; Milton, *Defense* of 1651, p. 70 (*Rex est Rex singularium, sed also universorum, but only a solarium*)

Omnes ut singuli and *ut universi*

Conversely, the advocates of the sovereignty of the Ruler argue that the Ruler is superior not only to *singuli* but also to *universi*: cf. Soto, IV, qu. 4, a. 1; Molina, II, d. 23, § 8; Bouvinus, *Pol.* p. 41, *De maj.* c. 4. Cf. also Bouvinus, *De maj.* c. 6 (the end of the State is *salus non hominum reipublicae non populi: universi primum, deinde singularium*), Suarez, III, c. 2, no. 4 (supra, n. 62); Grotius, I, c. 3, §§ 7–9, 12, III, c. 8, § 4.

69. Cf. Salmasius, I, p. 36 (although the *populus* was *universitas omnium personarum*, it is only *ut ficta una*, and *non populus non aliud est quam quoadam hominum multitudo*); Suarez, I, c. 6, no. 17 (*una persona ficta*), III, c. 2, no. 4 (*unum corpus mysticum, quod moraliter dici potest per se unum*), *Vind. c. Tyr.* qu. II, p. 75 (*universitas unus personam unam sustinet*, as the *Lex regia*[*] teaches); Lancaster, *Capitul.* nos. 48 sqq. (*magistratus realis* is the power *quae Reipublicae adhaerent, hoc est universitati, quae non nisi ficta personae ratione subsistere potest, et personam fictam constituit*), Grotius, II, c. 21, § 6, Wordenhagen, II, c. 6, §§ 22–4 (*persona* is used in political theory only for the *singulus*, but *ratione* it is also used for *populus*, for an office, for a *universitas*, and in all cases in which *plures personae unae ficta*)

The unity of the People a 'Person'

70. When a decision of the whole people is required, thinkers often speak vaguely of a *consensus populi* or a *voluntas universorum*, without going into the question whether or no they mean a regular act of an assembly which must follow the forms that are necessary for the decisions of a corporation: cf. Buchanan, pp. 16 sqq., 30 sqq., 78, Rousseau, c. 2, § 4 (the *consensus populi* is the will of the *Respublica*), Salmasius, I, pp. 8 sqq., 11, 31 sqq.; Mariana, I, c. 9, Vasquez, c. 47, Molina, II, d. 23, Suarez, III, c. 4, nos. 1–2, c. 4, no. 3, c. 5, no. 4, Bodinus, I, c. 5, §§ 15 sqq. (since rule is contrary to nature, it depends on the constant *consensus* of superiors and subjects); Grotius, I, c. 3, §§ 8 (*populi universitas singulis arbitris*), 13 (*populus solutudo dicitur*), II, c. 6, §§ 3, 7, 13, III, c. 20, § 5 (*populus totius consensu*); Salmasius, c. 6 (sovereignty belongs to the King either *in* or *voluntate populi*).

The common will as agreement of many wills

* The reference actually given in the *Vind. c. Tyr.* is to *Lex regia* in D, de fide instrumentorum.

But we often find the decision of the people definitely treated as equivalent to the tacit and cumulative acts of consent of so many individuals. The idea is applied to the conclusion of the original contract of government, or to some later act of approval of a limited government which is a substitute for that contract: cf. *Vind. c. Tyr.* qu. III, pp. 264 sqq., 287 sqq.; [Bezza's] *De jure mag.* qu. 5, pp. 18–20 (where the condition is made that the consensus must not be forced); Danaeus, I, c. 4, p. 41; Hotomanus, II, §§ 56–7; Suarez, III, c. 4, no. 4 (the consensus is 'tacit' when rule has been usurped, but it is *dubius* when subjection has been imposed by a just war), c. 10, no. 7 (*consensus tacitus*); Arminius, *De aut.* c. 4, §§ 11–14, *De rep.* II, c. 2, n. 5, c. 3, n. 7–8 (*consensus tacitus*, and until it is given there are no *subditi*), Knipschildi, VI, c. 4, nos. 12–13 (no right [of government] exists until *subditi pactum consensuerint*), Frederwreck, c. 10 (all Ruling authority rests upon *pactum*, since it is the *consensus universorum* which has either devolved it upon the ruler originally, or legitimized it afterwards); Bornitius, *De mag.* c. 3, *Part.* pp. 47 sqq. (*consensus spontaneus aut tacitus, expressus vel tacitus, verus vel quasi*, is what constitutes the Ruler); Grotius, I, c. 4, §§ 5 sqq., II, c. 6, § 18; and see the author's work on Althusius, pp. 303–7.

Similarly we often find writers who argue that the consent of 'the people' is required for laws contenting themselves with an informal *approbatio* (Molina, II, d. 23, §§ 6–7, V, d. 46, § 3) or an *acceptatio populi* (Suarez, IV, c. 19, and Claudius de Cassio, I, c. 3). In the same way *consensus tacitus* was held to suffice for certain alienations [of public property] (Grotius, II, c. 6, §§ 8, 10).

On the other hand, many thinkers demand a formal resolution by a regular assembly in certain cases. Most of these, though there are some exceptions, require it for the deposition of a lawful ruler who has become a tyrant 'in exercise', cf. Soto, IV, qu. 4, a. 1, Molina, III, d. 6; *Vind. c. Tyr.* qu. 12, pp. 293 sqq., Mariana, I, c. 6 (*consensus publicus*), Althusius, c. 38, cf. the author's work on Althusius, pp. 309–12. Some writers also require an act of a regular assembly for the appointment of the Ruler, cf. Soto, IV, qu. 4, a. 2 (*publicus consensus*), *Vind. c. Tyr.* qu. III, pp. 248 sqq. It may also be required as a way of giving assent to certain alienations [of public property], cf. Grotius, II, c. 6, § 9.

All must act of the People is its act

71. Molina, d. 23 (*supra*, n. 62). Althusius (c. 9, §§ 16 and 18) holds that only *universi membra de consensu communi* can dispose of the *jus regnandi*, because only *membra regni universa simul* can constitute that right; but he also believes (cf. his Preface: cf. also c. 9, § 19; c. 18, §§ 13, 84, 104, 105–4, and c. 38, §§ 105–9) that even the whole of the people, acting unanimously, cannot make any valid alienation or division of sovereignty. Hotomanus (II, § 39) regards *regnandi* as competent to decide *jura regni* 'by common consent'; cf. also his phrase (§ 40) *in communem plenum . . . ita totulus ordo populus reipublicae institutor et regulator.*

When unanimity required

72. The assumption of unanimity was taken for granted in regard to the contract of society; cf. Althusius, c. 9, § 19; Suarez, III, c. 3 (*per solutionem omnium pro se alis consensum*); Grotius, II, c. 5, § 23 (*vide supra*, nn. 59–62). The *consensus omnium* is required for any change in fundamental laws by Bartus (*De mag.* II, § 17–21); and, as we have already mentioned (*supra*, n. 43), Besold (*De mag.* n. 1, c. 1, § 5) and Tulden (I, c. 11) require the consent of *omnes magnates* in a democracy for any change of *quasi lege democratica*. According to Althusius (*Dicaeologia*, I, c. 8), nos. 37–43) a unanimous resolution

should also precede the imposition of new taxes. [Gierke adds a reference to a note in a previous section of his fourth volume (p. 241), which is not translated here.]

When majority-decision allowed

73. Cf. Althusius, c. 17, §58, Buchanan, p. 79 (*nonnunquam populus vel major pars* is legislator, creator of government, and judge of the King), Milton, *Defensio* of 1651, c. 5, pp. 63–4, c. 7, pp. 69–70 (*populi pars major et potior*, i.e. *plus quam dimidia pars populi*, is *Superior Rege*). Generally, a majority-decision was regarded as adequate both for the [original] choice of a form of State and appointment of a Ruler, and for any subsequent changes in the constitution, cf. Victoria, III, nos. 14–15 (in the appointment of a Ruler a majority is enough, *nam alia ratio*, since the consent of all cannot be attained, the whole of Christianity might give itself a Ruler by majority-decision; and in the same way a majority in a republic may, if it wishes, choose a monarch), Soto, qu. 4, a. 2, *supra*, n. 43.

The fiction that majority-decision is made equal to unanimous decision by a contract to that effect

74. In most writers we only find a reference to the general rules of the [Roman] law of corporations. Grotius is the first writer (p. c. 5, § 17) to use the fiction that the majority-principle must have been introduced by an act of contract into all associations, both public and private (*quod in ea ratio, ob quam nonnunquam pauperior civitatis ait, unanimitas et quae pars major numero unanimitatis obligant singulos qui sunt in societate*). He argues (1) that in each contract of society we must assume a *colentes in societatem coalescunt... ut ratio aliqua esset coniunctionis agendae*, (2) that this *ratio*, or way of transacting business, can only consist in the supremacy of the majority, because it is obviously improper *ut pars major sequatur minorem*, and therefore (3) that so far as special *pacta et leges* do not provide otherwise, *pars major habet jus integri*. Hobbes takes a similar view (*De cive*, c. 6, §§ 1–2). Only unanimity is valid in a *multitudo extra civitatem*, but it marks the beginning of the transformation of such a multitude into a State when its members agree to *in ea ratione, quae a quibusdam in medio proponitur, pro sententia praesentem habendo et quod voluerit omnium major pars*. Otherwise no single will can be attained. If any person will not accept this agreement, the rest can constitute the State without him, and can exercise against him their original right—the *jus belli*; cf. ibid. § 10.

Representation of the People by Estates or 'Ephori'

75. See the author's work on Althusius, pp. 216–19, and § 12, n. 129 of this volume [not here translated]. The author of the *Vind. c. Tyr.* invokes, as the organ for securing the observance of the rights and duties imposed by contract (whether it be the contract made with God, or that made with the king*), not the *universa multitudo*, but the *dicti magistratus regni*—the *officiales Regni non Regis*, or *caeterae et ejusmodi superiores*—inasmuch as these officers a *populo constituuntur, conservant*, and thus *universum populum eorum representant*. qu. II, p. 89, qu. III, pp. 148 sqq. A similar view appears in the *De jure mag.* qu. 6–7 (*ordinar non rotor*), Buchanan, p. 90 (*ex omnibus ordinibus selecti*); Hotoman, cc. 13–14, Mariana, I, c. 8 (*procerum et sapientum*).

Althusius includes both the 'Ephori' and the *summus magistratus* among the *administratores* of public authority, who are appointed and commissioned by the *consociatio multitudo* because it cannot easily meet itself, and who, within the limits of their commission, *universum populum representant* (c. 18, §§ 1–47): *Ephori sunt quidem, populi in corpore politicum consociati conjuncti, dimensionis et summae Respublicae seu universitatis commissionem, ut representantes eandem potestatem*

* The *Vind. c. Tyr.* supposes two contracts—that of people and king with God (the divine covenant), and that of people and king (the secular contract of government).

et pare illau stantar in numero magistratu constituendi, eoque ejus [et] consilio et magistri corporis consequi possunt, mores et quidem honestos corrumpi et irritandi et omnes unquam et Reip. perniciosi, et rudes extra limites officii contendendi, et denique in proximiori et verendi omnibus modis, ac Reip. quod dominantur capiat prosunt modus, adeo, facto, omnipotens ad omnium summa magistratur (ibid. §48). These 'ephors' are appointed by popular election, but they may also be appointed, *ex populi concursu et benigno*, by nomination or co-operation (§59): their commission may also be made hereditary *ex omnium consentiunt numerali* (§107): they constitute a *collegium*, which acts *collegialiter* and by its *major pars* (§62). as such a college they discharge the *officium generale*, with which they are vested, of representative exercise of popular rights (§§69–89, c. 38, §§28 sqq.), but there is also, distinct from this 'general office' of the college, an *officium speciale* of individual 'ephors' (c. 18, §§50–1, c. 38, §§46–52).*

Hotomanus has a similar theory (II, §§46–51, III, §§44–54): *ephori ita ordinati sunt* have to exercise the right of the sovereign people *ex jure et consensu populi* as *universi, quatenus summum potestatem representant*, they are superior to the Ruler. Grotius argues (II, c. 6, §9): *populus autem consentire intelligitur, cum talem ordinat . . . nec per legatos partium integritatem mandate negligente patitur, nam facinus et quod per alios facinus*, cf. I, c. 3, §10, III, c. 20, §5. See also Frederuleich (c. 10), who holds that, in lieu of *universi*, smaller assemblies have often to elect the Ruler by virtue of 'delegation': Tulden (II, cc. 19–23), who regards the *optima forma* as a *monarchia temperata, optimatibus sed electis populi in partem regimenis adhibitis*; Milton (*Defense* of 1651, c. 7, p. 70), who argues that the objection of Salmasius (that we regard *plebs sola* as *populus*) is incorrect, for we include *omnes ordines agnoscunque esse in* the people, inasmuch as *nunc septemviri supremam eorum rationem habemus, in quo etiam proceres et pars populi, non pro sese quidem solo, ut antea, sed pro iis nunciatur, a quibus electi fuerant, suffragia ferendi legitimum jus habent.*

The People as superior to its representatives

76. The author of the *Vindiciae c. Tyr.* accordes to the assembly of the 'ephors', as *Regni quasi Epitropi*, equal rights with the people, and an equal superiority with the people over the king, inasmuch as any act of a majority of that assembly counts as the action of the people (qu. II, pp. 91, 94, 114, qu. III, pp. 148, 149, 148 sqq., 197 sqq., 216 sqq.), but he expressly insists that this assembly cannot, by any resolution or any omission on its part, forfeit the rights of the *populus universus* (qu. III, p. 173). The same line is adopted in the *De jure mag.* (qu. 6–7): the ephors, in regard to the Ruler, are *defensores ac protectores jurium quasi reipsum potestatis* [i.e. they are the guardians of popular sovereignty], but they cannot actually prejudice the sovereign rights of the people itself. Buchanan (pp. 30 sqq.) only allows the assembly of Estates to produce a *epieikeia* in the sphere of legislation, vindicating the right of final decision for the *universus populus*.

Althusius safeguards the People as against its Ephors

77. Althusius expressly insists that though the Ephors, in their collective position as representatives of the sovereign People, are superior to the Ruler, and though, in their assembly, they exercise the rights of superior in respect to him (c. 18, §§48–69, c. 33, c. 28, §§28–64, and also c. 17, §§55–61), they are merely commissioners of the people; *constituuntur, proceruntur, deputantur aut*

* This whole theory of the 'ephorate' (which appears later in Fichte) is derived from Calvin's *Institutio* (IV, c. xx, §31) where he speaks of 'magistrates constituted for the defence of the people, to bridle kings, such as the Ephors in Sparta, the tribunes at Rome and to-day, it may be, in each kingdom the Three Estates assembled'.

constituentes by the people; and they must recognise the people as their *Superior* (c. 9, §§ 22–3). Accordingly while he applies to the Ephors the principle that the action of corporate representatives counts as the action of the corporation itself (c. 18, §§ 11, 26, 53–8), he limits the application of that principle by the *fonts* of their commission (ibid. §§ 41–6), and he expressly argues that the Ephors cannot transfer any right of the People to the Ruler, or forfeit any such right by omitting to exercise it, since, in that case, *penes Ephoros, non Respublicam et Populum, summum Rep. jus esset* (ibid. § 124). Again, if there be any failure of the Ephors, he claims that all their functions revert to the community of the people, in virtue of its imprescriptible and inviolable right, and then these functions are to be exercised *communi totius populi tributim, curiatim, centuriatim vel versus regali ant collecti* (ibid. § 125). Similar views appear in Hoenonius, II, §§ 46, 51, IX, § 50.

78. Thus is the view of Hotoman (cc. 13 sqq.), Boucher (I, c. 9, II, c. 20; III, c. 8), Danaeus (IX, c. 2, p. 221), Mariana (I, c. 8), Milton (op. cit.): cf. Alstedius, pp. 56–61 (the *ordines* [or Estates] are a *Resp. compendium*), Frederich, c. 29, and Keckermann, c. 4, pp. 561 sqq. We also find German professors of public law (and especially Pfauncerer, Besold and Limnaeus) generally ascribing to the people of the Reich the rights exercised by the Reichstag, and even the electoral right of the Electors, just as they also ascribe the rights of provincial Estates to the people of the province as the true 'Subject'. cf. supra [in a part of vol. IV not here translated], p. 242 n. 109. Bornius (*De Rep.* V, § 9), in speaking of *imperium mixtum*, remarks that its possessor is *tota Respublica, et nonnulla ordines et status regni.* *The People itself as the true 'Subject' of popular rights.*

79. See the author's work on Althusius, pp. 90–91, 343.

80. Supra, n. 46.

81. Supra, n. 47.

82. The 'Subject' of Sovereignty in a Republic is *plures*, according to Victoria (III, no. 10), Bellarmine (*De laicis*, c. 6), Bornius (I, c. 3, § 4), Keckermann (II, c. 2), and others; it is either *pauci* or *omnes*, according to Bodin (II, c. 1) and Suarez (III, c. 4, nos. 1, 5–6, 11). It is *multi*, which may again be either *paucioris* or *omnes*, according to Bornius (*De Rep.* c. 3, and *Part.* p. 45). It is *paucioris* or *tota civitas*, according to Winkler (V, c. 4). Similarly, in the view of Grotius (I, c. 3, § 7), *plures* are the *subjectum proximum of imperium* in a Republic, and *plures* or *omnes* are the 'Subject' of *imperium personale* in this form of State on the theory of the advocates of 'double sovereignty' (e.g. Alstedius, p. 14, Tulden, p. 10, Besold, *De imp.* sect. I, cc. 2–7). The theorists of popular sovereignty also make a plurality of persons into the organ of government in Republics: cf. Mariana, I, c. 3; Danaeus, I, c. 6, and Althusius, c. 39, § 1 (*summus magistratus polyarchicus*). On the technical term 'Polyarchy' see n. 46 supra. *The plurality of the 'Subject' of Sovereignty in a Republic.*

83. Cf. Bodin, II, c. 6 (the magnates, in a system of aristocracy, *collective sumpsere*), and c. 7 (where the same is said to be true, in a *status popularis*, of the *esse omnes*), Bornius, *Part.* p. 51 (the *esse collective* such are to be regarded as the Ruler), Keckermann, II, c. 2 (*plures ex aequo universum*), Althusius, c. 39, §§ 32 sqq. (when there is a *magistratus polyarchicus*, the rules is *omnes conjunctim*), §§ 45 sqq. (when there is a [*magistratus*] *aristocraticus*, the exercise of majesty belongs *conjunctim et solidum penes optimates*), §§ 57 sqq. (when there is a [*magistratus*] *democraticus*, the *populus universus* is also the *summus magistratus*). Similar views occur in Hoenonius, IX, § 3, X, § 40; cf. also Gregorius, V, cc. 1–2; Molina, II, d. 25, §§ 1–14; Holder, pp. 976 sqq.; *The plurality a collective plurality.*

Gruger, *Coll. pol. Disp.* I, III, IV; Arnisaeus, *De rep.* II, cc. 4–5; Kulpschuldt, I, c. 1, no. 50 (*plures et unum*).

The collective plurality is a single, but artificial, Ruling 'person'

84. Arnisaeus (*De maj.* I, c. 3; *Pol.* c. 11) contrasts the republican Ruler, as *conspiratione et analogia unus*, with the Ruler who is *unus natura*; Berckringer (I, c. 4, §10) opposes the *unus analogia* to the *unus numero*, Grotewohl (cc. 9, 11) contrasts the *corpus unum* with the *persona unus*, Bornitius (*Part.* p. 45; *De maj.* c. 8) opposes the *unus τῷ λόγῳ* to the *persona unus*. Keckermann (*Pol.* I, c. 2) explains that the whole perfection of the *status politicus* depends upon the *plures qui imperant* assimilating themselves by their unity to a monarch. According to Althusius (c. 39, §59) the essence of democracy lies in the fact that *populus qua mutor unus convocat pro majestate et quasi unum representat in majestate*. Hippolithus a Lapide (I, cc. 3, 4, 6, 14, 15) assigns the rule in an aristocracy to the privileged Estates as constituting *unum corpus, universitas et collegium*, etc. Cf. also Suarez, III, c. 3, nos. 7–8.

Hobbes (*De cive*, c. 7, §§13–14, c. 12, §8, *Leviathan*, c. 18) insists most definitely that, as compared with the nature unit on which the will and action of the people is devolved in a monarchy, the democratic assembly or the aristocratic *curia* constitutes only an artificial unity. He draws the conclusion that, while a monarchical Ruler may contravene the Law of Nature, a republican Ruler cannot, on the ground that in the former case the natural and the artificial will are one and the same, but in the latter there is only an 'artificial will'. The pre-eminence of the monarchical form of State is constantly referred by most writers to the superiority of natural unity over unity which is artificial, cf. e.g. Bodin, VI, c. 4, nos. 710 sqq., Hobbes, *De cive*, c. 10, *Leviathan*, c. 19.

85. Cf. Bodin, II, cc. 6, 7; Bornitius, *Part.* 41, *De maj.* c. 3, Althusius, c. 39, §§39 sqq., Hobbes, *Leviathan*, c. 18, Hippolithus a Lapide, c. 3, sect. 3, c. 6, sect. 3, c. 7. Mention has already been made (*supra*, nos. 42, 43) of the difficulties into which thinkers fell in this connection, when they sought to extend to democracy the distinction between the people as the 'Subject' of popular rights and the people as the duly constituted Ruler. Keckermann (II, c. 3) finds even in a democracy [no less than in an aristocracy] a system of reciprocal alternation of ruling and being ruled.

The community as a democracy identified with the majority

86. Bodin (II, cc. 1, 6–7) refers the whole distinction between aristocracy and democracy to the numerical relation of rulers and ruled, making the former a rule of the minority, and the latter a rule of the majority. But once, from this point of view, he ranks as a democracy a state of 20,000 citizens in which 11,000 participate in the popular assembly, and once, again, he allows a majority of the assembly as constituted to decide, it follows that the *unum vel major pars* who, on his definition, are the rulers in a democracy may in certain circumstances be represented by a minority of the community.

Grotius again and again enumerates together the king or the *major pars proceres* or the *major pars populi* as being the 'Subjects' of international rights, according to the form of the constitution: cf. e.g. III, c. 20, §§2–4. Hobbes (*De cive*, c. 5, §8) says bluntly: *sententia maioris omnibus valitura sua, quae est sententia majoris partis eorum hominum, in quibus constitutus est*, cf. c. 7, §5. See also Bornitius, *Part.* p. 45 (*unanimis aut major pars*), Keckermann, II, c. 1; Besold, *Disc.* III, *De democratia*, c. 1, §1 (*populus vel major pars*).

87. Cf. Bodin, II, cc. 6–7; Althusius, c. 39, §§ 37 sqq. and 58 sqq.; Hobbes, *De cive*, c. 7, §§ 5 and 10 (in an aristocracy, he argues, just as in a democracy, the time and place of the meeting must be fixed, because otherwise there will be *non persona una, sed dissoluta multitudo nisi mipsa unana*. For this reason the *senatus* or *conventus* is often described as the Ruler, and Hobbes constantly avails himself of the formula that Sovereignty resides either in *unus homo* or in *unus senatus* or *unum concilium*). *The assembly as a Republic described as the Ruler*

88. See the antitheses in n. 84 *supra*.

89. Cf. Bodin, I, c. 8, nos. 105–6: *Principis majorum facta consulto capta ac prudenter obligatur, si regnum hereditario jure obtinuerit, vel etiam testamento delatum sit*: otherwise [i.e. where he has not obtained the Crown by inheritance or by will], he is [only] obliged *quatenus Reipublicae commodo contractum est*. [Gerke seems to have telescoped the argument of Bodin, which is really to the effect (1) that a king succeeding by hereditary or testamentary right is bound as a private man by the *facta consulta* of his predecessors in title, but (2) that such a king is only bound to respect such *facta* to the extent to which his predecessors were themselves bound—i.e. to the extent to which they were made for the benefit of the State.] Cf. also Arnisaeus, *De jure maj.* I, c. 7. *How far is a Ruler obliged by the acts of his predecessors?*

Grotius (I, c. 7, §§ 11–37; II, c. 14, §§ 10–14, III, c. 20, §6) also starts from the point of view of the law of inheritance. He distinguishes two cases: (1) When they are *omnium bonorum heredes*, the *successors* are absolutely obliged by the actions of their predecessors, (2) when *in jure regni dominari succedunt*, they incur no personal obligation at all. In the latter case, however, there is still an obligation, which is produced and mediated *per interpositam continuam*. There is a presumption that the devolution of supreme authority on a Ruler involves, as part of itself, the simultaneous devolution of the *jus in obligando, jus in aut per majorem sui partem*, which belongs to the people just as it belongs to any other group (II, c. 14, § 10). It thus follows that, in so far as the people itself is obliged in virtue of this *jus in obligando*, the *successor* will also be obliged *ut capud* (ibid. § 12). Now an obligation of the people is to be assumed not merely in any case of *utilitas gentis* [where there has been an act done in the definite expectation of a benefit], but also in any case where *probabilis ratio* is present [where there is good ground for expecting a benefit from an act done], and it is only in regard to contracts previously made by usurpers that the people—and with it, therefore, the *rex novus*—has merely a limited liability *de in rem versa* [for expenses actually incurred] (ibid. § 14).

90. Grotius, II, c. 14, §§ 1–2 and 6; III, c. 20, §6. Controverting the thesis of Bodin, that the sovereign can dispense himself from his contracts, or recover his freedom of action (*in integrum in restitutio*) in respect of such contracts, Grotius (II, c. 14, §§ 1–2) distinguishes *actus Regis qua regis nati* and *actus regis privati*. The first sort of acts count *quasi communiter factorum*: *in iisdem enim actus, nisi leges id quae communiter factum non nolluerit, quia communitas subjici rationem non est, sic nec leges regis; quare adversus hos contractus rescindere licere non licet; erunt enim illi ex jure gentis*. At the same time Grotius maintains that the people can challenge such *regis actus* [though they count as acts done by itself] on the ground that they exceed either the special limits of the Ruler's right [in a given case] or the general limits of such right [in all cases]. The private acts of the king, on the other hand, count not as acts *communiter ut actus partis*; and in case of doubt they fall under the ordinary *Grotius distinguishes between the official and the personal acts of the King*

law, and are thus subject to restitutio in integrum and to the King's power of dispensing himself from *legal punitions*.*

In the same chapter (II, c. 14, §8) Grotius allows that contracts between the king and his subjects always give rise to a true and proper obligation; but he adds that it is only under Natural Law that this obligation can be asserted if the king has acted *qua rex*—though it may be also asserted at civil law if he has acted otherwise [i.e. *qua privatus*].

91 Grotius himself, in the passages just cited, has recourse to the right of the community of the people and the devolution of that right.

The analogy of the Body Politic

92. Cf. Guevara, *Horologium Principis*, 1, c 36 (based on John of Salisbury—see Gierke, *Political Theories of the Middle Age*, translated by F W Maitland, p 24): cf also Knichen, 1, c. 6, thes 11 (which is similar), Modrevius, *Of the bitterness of the general miseries*, 1557, p. 162, Buchanan, pp 239ff (a comparison of *mortis ordo* with the human body and its ordering, articulation, harmony and unity), Gregorius Tholosanus, 1, c 1, §§6–16, III, c. 1, §1, X, c 1, §1, XVIII, c 1, §4, XXI, c. 1, §§4–10, and elsewhere (analogy of the *corpus civile* with the *corpus physicum*, in regard to head and members, soul and nerves, harmony and unity, and the different powers and functions of the different parts: see also his *Syntagma*, III, c. 2, §§1–2), Lossius, *Dedicatio* of 1605 to the Archduke Albert of Austria (comparison of the Prince with the *caput*, of the *respublica* with the *corpus*, of *civitates* with *membra*, of *cives* with *artus ac quasi membra et totius reipublicae corpus constituunt*), Besold, *Pract. et fin. polit. doctr. Dissertatio*, 1, c 5, §4, c 8, §1, *Diss de reg* sect. 1, c 1, §4, sect. 3, c. 2, §8, c. 7, §3 (comparison of the State with a *corpus physicum* or *corpus harmonicum*, in respect of its head and members, and the different functions of each), Berckringer, 1, c. 4, §10 (the Rulers are the head of a body, whose parts have also their functions), Werdenhagen, II, c. 24 (the essence of the State is *unio—nonnum illud nonnumquam vocabulum societatem significans*—a union produced by *status et ordinatio harmonica*, just as in a physical body), cf also Bodin, II, c. 7, no 236 (*nisi partes ac ordo membra singula, quae principi sint quasi adigantur*). It still continued, in our period, to be a favourite habit of thinkers to pursue this analogy into a theory (1) of the growth, the successive ages, the maladies and the death of States, and (2) of the methods which were serviceable in preserving or restoring their health: cf. Buchanan, op cit.; Gregorius, lib. XXI–XXIV, Besold, Diss. II, *de republica conservanda*; Knipschildt, 1, cc. 15–17. [On this analogy in general see Maitland, *Collected Papers*, III, pp. 285–305.]

Sovereignty as the Soul of the State

93. See Besold, *Diss.* 1, c 5, §1; Arumaeus, *Polit* c. 6, *De rep.* 1, 5, n. 3, Bornitus, *De reg* n. 5, *Part* p. 45 (the *four principles* of *majestas* in *summo imperio summae universali respublicae*), Fridericus, c 10 (government is the *spiritus vitalis* of the body politic); Bornius, *De reg.* v, c 8, Grauwinkel, c. 4 (*quod in universo Deus, in corpore anima, id in imperio majestas est*), Knipschildt, 1, c 1, nos. 50–51; Tulden, 1, c. 9 (*civitas* = *corpus*, *auctor* = *anima*, *respublica* = *animae anima et vita*). [With the dictum of Grauwinkel compare a dictum of the eighteenth century, quoted in Van Tyne, *Causes of the War of American Independence*, 1, p 318, to the effect that 'legislative sovereignty is as essential to the body politic as the Deity to religion'.]

* Grotius thus disagrees with Bodin so far as official acts of the king are concerned (the king cannot dispense himself from an official act of contract, or recover freedom of action in regard to such an act); but he agrees with him in regard to personal acts of the king.

94. See Gregorius, I, c. 1, §§6–7 and XVIII, c. 1, §4 (*corpus civile, quod ex magistratibus personae propriae corpori ut omne compositis, tanquam membris, constat*); cf. also Bécold, *De mag.* III, c. 7, §3.

95. See Victoria, III, no. 4, Soto, IV, qu. 4, art. 1; Molina, II, d. 22, §§8–9; Suarez, III, cc. 1–3 (supra, nn. 60–61). Vasquez, however, in c. 47, nos. 6–8, warns his readers against drawing conclusions from the analogy between the relations of *populus* and *cives* and that of *corpus* and *membra*. There are also, he contends, fundamental differences: the limb cannot change its position, and the citizen can; the foot or the hand cannot become head, but any citizen may; the death of the head causes death of the limbs, but the death of the head of the State produces no similar effect; in the body government remains always in the head, but in the State it may change its residence. *Vasquez on differences between the body and the Body Politic*

96. Althusius, Praef. and c. 9, §§18–19: 'majesty', like the *anima* in *corpore physico*, resides as an indivisible and inalienable unity in the *corpus symbioticum universale* considered as a whole: it is the basis of the rights of government which this whole exercises over its parts. Cf. also *Dicaiologica*, I, c. 7.

97. Grotius (II, c. 9, §5), referring erroneously to ancient writers,* ascribes ἕξις *pluri* or *apertius omni* to the people, regarded as a *corpus* or *christabes* [sc. *conglomeratum*]. He adds, *ex eadem igitur vere ἕξις in populo est inter civilis consociatio plena atque perfecta, cujus prima productio sit summum imperium, unaquam per quod respublica coheret; plene autem haec corpora artificialia inter habent corporis naturalis.* Just as the latter [the natural body] *idem non esse desinit particulis paulatim mutatis*, so the former—the 'moral' body of the People—remains the same though its members change. But like the natural organism, the People may also succumb, and lose its rights, and it may do so (1) *interitu corporis*, that is to say, either by the simultaneous disappearance of all its members (§4) or by the disintegration of their unity (§5), or (2) *interitu spiritus*, that is to say, by losing any supreme authority (§6). On the other hand, the People still remains a 'Subject' of rights and duties, as much as ever, in spite of any alienation of territory (§7) or any alteration of the constitution (§8), and the union of two peoples to form one (§9), or the division of one people into several (§10), produces no loss of a people's rights, but only a *commutatio* or *diuno* of rights, as the case may be. See further I, c. 1, §6, c. 9, §7, V, c. 5, §103 (*maximum jus corporis in parte*), c. 6, §§4–5 (*imperium* in an undivided body politic is like the soul in the body), c. 16, §16 (the body politic remains the same even if the constitution be altered), c. 21, §7 (on *mors* of the body politic). *Grotius on the analogy of the Body Politic*

But Grotius, while he notes these analogies, also remarks (I, c. 3, §7) that in contrast with the 'natural body' the *corpus civile* may have one common head for a number of bodies [e.g. in the case of a Federal State]. Going more into detail (II, c. 8, §§4–5), he argues that the 'moral body', being *voluntate contractum*, is different in kind from the 'natural body'. Owing to its contractual origin, the integral parts of a moral body are *non ita sed corpora ut sunt partes corporis naturalis, quae non corpora sine morte non possunt, et adeo in*

* Gierke here refers the reader back to vol. III of the *Genossenschaftsrecht*, p. 22, n. 47, and to the correction on p. xxi of his preface to that volume. The point is that Grotius was doing violence to Stoic theory, and to Plutarch and the Roman lawyers who used that theory, when he ascribed to them his own idea that a single spirit pervades bodies composed of different parts. The Stoics and their followers, Gierke contends, held no such view.

non corpori non abscindatur. The right of a moral body over its parts is *ex presumpta voluntate retentibus*, and the amputation of parts against their will is therefore unjustifiable; while, conversely, the part may secede from the body —and, it is true, without due reason, but the plea of necessity will serve as such a reason. Again 'the right of a part to protect itself' is greater than 'the right of the body over the part', *quia pars utitur jure quod sibi mentium tantum habent, corpus non item*. Grotius also emphasises the point (in his note to II, c. 9, §3) that it is only *dialogyaidis* that he speaks of the *corpus* and the *ἔθνος* or *spiritus* of the People.

The double 'Subject' of sovereignty

98. Grotius, I, c. 3, §7 *et eorum subjectum commune est corpus, proprium civitas*, so the whole body politic and the Ruler are both simultaneously 'Subjects' of political authority [the one generally, and the other specifically].

99. Whereas Vitoria (III, no. 4) still expressly insists that the *civitas* is no *mentum* or *artificium*, but a *natura perfecta est*, and therefore properly comparable to the human body, Grotius already speaks of it as a *corpus artificiale*, and as *voluntate contractum* (cf. supra n. 97 and II, c. 9, §8).

Hobbes on the analogy of the Body Politic

100. Compare the introduction to the *Leviathan*, where *ex qua summum potestatem habet* is described as *omnis totius corpus magnum et mansum*, the authorities and officials are the artificial joints; rewards and punishments are the motor nerves, the wealth of all is the strength of the body; the safety of the people is its business or function; the counsellors are its memory; equity and the laws are its artificial reason; concord is its health, sedition its sickness, and civil war its death. Finally, *pacta quibus partes hujus corporis politici conglutinantur mutuoque divisum illud unibum 'Peut' non 'Possumus humanum' a Deo profectum in principio tam creavit mundum*. Cf. *Leviathan*, c. 17, *De cive*, c. 5.

The organism of Hobbes is really a mechanism

101. Introd. to the *Leviathan* just as *ars humana* imitates nature, which is the *ars divina*, and just as it creates (in the watch, or automaton, or machine with springs and wheels) an *artificiale animal* with a *vita artificiale*, so it also imitates that *rationalissimum animal* Man. *Magnum illi Leviathan, quod Civitas appellatur, opificium artis est et Homo artificialis, quamquam homine naturali, propter cujus protectionem et salutem excogitatus est, multo major*, and Man is here at one and the same time *natura* and *artifex*. Cf. *De cive*, c. 5 and c. 7, §§10 sqq., and *Leviathan*, c. 17, on the *potentia artificiosa* of this body, *Leviathan*, c. 19, on *mensura* as the way of construction of its *vita artificiale*, ibid., c. 20 and following, on the mathematical rules for the construction of this artifice, and c. 21 [? c. 26] on laws as *vincula artificialia*.

People and State identified by Monarchomachs

102. Thus the *Vindiciae Tyr.*, qu. III, describes the king as *minister et minor Reipublicae* (p. 144), and the representatives of the People as *officiatos Regis non Regni* (p. 148), but otherwise always depicts the community of the People as the 'Subject' of supreme authority (pp. 143 sqq., 248 sqq., 298 sqq.). In the same way Hotoman makes the immortal *Respublica* or the *Regnum* superior to the mortal king (*Franogallia*, c. 19); but he proceeds to identify this 'Subject' [of supreme authority] with *ipsa civitas ac subjectorum universitas et quasi corpus reipublicae* and with the *populus* (ibid. c. 19, *Quaest. illust.* qu. 1), and he expressly declares that *summa potestas est populi* (*Franogallia*, c. 19). Boucher (1, c. 5) states in so many words that the sovereign People in its corporate unity is identical with the *Regnum* or *Respublica*: cf. II, c. 20, III, c. 8. Rossaeus (c. 2, §§1 and 11) ascribes to the king only a *potestas potestate Reipublicae subjecta*, and declares the *Respublica* *mixta* to be *superior* [i.e. sovereign]. Mariana (I, cc. 8–9) sometimes describes the *Respublica*, and sometimes *mixta*, as the 'Subject' of majesty. According to Hotoman (II,

§§ 39, 41, 51, and III, §§ 5, 44–50) it is the *Respublica*, the *Respublica sive membra eius*, the *populus*, the *populus universus*, or the *totus populus*, which is the *penes dominum* of political authority, the source of all government, and *pater familiarum*. In the treatise [of Bem] *De jure mag.* (qu. 6), *summum imperium* is ascribed to the People, but occasionally this *summum imperium* is itself personified, cf. pp. 26 sqq., where the *magistratus subditorum* are described as dependent not on the *summus magistratus*, but on the *subditorum* or on *summa illa imperii sive regni δύναμις et authoritas*, cf. also pp. 37 sqq. and 74 sqq., where the Estates are regarded as *defensores ac protectores parentum ipsius subditorum potestatis*, even as against the Monarch himself. In Buchanan (pp. 16 sqq., 48 sqq. and 78–90) and in Duaren (I, c. 4, III, c. 6) it is the *populus universus* or *subditi* who appear as the 'Subject' of supreme authority.

103. The *Vind. c. Tyr.* (qu. II, pp. 89, 114 sqq., qu. III, pp. 89, 114 sqq., 131 sqq., 144, 148, 192 sqq., 196, 198 sqq.)* deals in this way with the appointment of kings and representatives of the People, with the right of legislation, with the control of officials, and with the right of resistance or deposition in the event of disobedience to God or *falsum contra populum* [i.e. it sometimes ascribes all these rights to the *Populus*, and sometimes to the *Respublica*]. Hotoman (cc. 6–8) deals in the same way with the right of appointing, judging and deposing the king, and with the rights of deciding about a disputed succession. Cp. Rousseau, c. 2, §§ 8–9 (on the right of the *Respublica* in the matter of legislation and consent to taxation) with § 4; cf. also Boucher, I, cc. 10–19 and III, cc. 14–17. *Rights ascribed indifferently to People or State*

104. Cf. the *Vind. c. Tyr.* (qu. III, pp. 218 sqq. and 235 sqq.): the *patrimonium Regis* belongs to the People, and not to the king. The king has no right of property in the possessions of the Fisc, the demesne, etc., and he cannot therefore alienate any part of them; indeed, he is not even the *usufructuarius* (since he cannot so much as contract a mortgage), but only the *administrator*. Hotoman (c. 9) argues that the *res propriae* in the demesne, regarded as the *dos Regni*, render *penes universitatem populi sive Respublicam*, cf. *Quaest. illust.* qu. 1. According to Hotomanus (II, c. 99) *res regni, rationes proprietatis et dominii, pertinent ad Respublicam sive membra eius, sed rationes eius et administrationis spectant ad magistratum, ut sunt commendatae*, cf. also V, § 72, where a distinction is drawn between the *aerarium publicum*, which is *Reipublicae proprium*, and the *aerarium Principis*, which belongs to him as a private person. *So with public property*

105. Cf. *Vind. c. Tyr.* (qu. III, pp. 196 sqq.) on *Reipublicae universitas* in legislation. Rousseau (c. 1, § 3) makes the *Respublica* choose the form of the State and determine *quibus ordinibus et parentibus constituendae civitatis*, and similarly (c. 2, § 11) he makes it able *potestatem Regis diminuere, retinere, commutare, penitus abrogare eiusque ministros*. According to Mariana (I, c. 9) the King cannot alter the *leges universae Reipublicae solemnes constitutae, sed universitatis solemnitis certaque sententia*. Cf. on this supra, n. 70. *So, too, with public decrees*

106. Althusius, in his Preface, begins by describing the *Respublica sive consociatio universalis* as the 'Subject' of the rights of majesty, which belong to this *corpus symbiosium* in the same sense as we may attribute to it *spiritum unum et cor... quibus subditis corpus illud alunt pereat*. The *Principis* is only an *administrator* [of the rights of this body], and the true *proprietarius et usufructuarius* is the *populus universus* or *corpus unum symbiosium ex filiorum numerus*. *Similarly, Althusius identifies Respublica and Populus*

* Something has gone wrong with Gierke's references here, as he repeats the reference to p. 89 and pp. 114 sqq. twice over, for quaestio II and quaestio III.

omnipotentiae conservatio. The *Respublica* cannot transfer or alienate these rights of majesty, even if it wishes, any more than an individual can share his life with another. At the same time, however—both in this context, and when he subsequently proceeds, in the body of his work, to justify these general principles in detail (cc. 5, 18, 19, 38) and to deal with the several rights of majesty (cc. 10–17)—he identifies this sovereign body which possesses the *regna propriaria* with the *populus*; and he identifies the *populus* in turn with the *universa membra consociata* or with *omnes simul*. Similarly he ascribes to the 'People' the property and usufruct in *res publicae et fiscales*, assigning to the *summi magistratus* [only] the power of administering them *ratione status*, with such rights as the 'People' has granted (c. 37, §§ 1–6), but in the same breath he describes the *Respublica* (ibid. §§ 117–18) or the *corpus consociatum* (c. 17, §§ 1 sqq.) as being the owner.

The persona Civitatis in Salamonius

107. Salamonius, *De principatu* (1, pp. 28–9), seeks to prove that *Princeps non legibus ligatur* by the help of a distinction, based upon Cicero,* between the *Persona Civitatis* and the *Persona Principis*. Since it is the *Persona Civitatis* which is acting through the *Princeps* when he makes laws or does any other act of government, the Ruler who obeys his own law submits himself not to himself, but to as *persona quae gerit*. It is true that he represents that 'persona' [the *Persona Civitatis*], but he only does so *ut gerens* [and he does not therefore absorb it into himself]. In reality, both 'persons' act at the same time, but they act in different ways—the *Civitas* acting *ut mandans*, and the *Princeps ut mandatarius*, with the result that the *mandans* acts *ut major*, and the *mandatarius ut minister*. It follows that *it is ipse Civitas* which *non agit et non legit soluta*!

It is really the same as the People

But Salamonius always identifies this *Civitas* [or *Persona Civitatis*] with the *universus populus* which creates the Ruler and remains his *Superior* (pp. 16–28); he treats the *lege ab universo populo conplexa* as being *pacta* between the People and the Ruler (pp. 8–16), and he interprets the People itself as a *mortalis*, and the Ruler as its *procurator* or *minister* (*supra*, n. 69). See also his *Commentarii*, folio 41 verso.

The Ruler confronts the Respublica or Populus as something external to it

108. It is true that the Ruler is often described as *Reipublicae pars*, and the principle that the whole is greater than the part is often applied in favour of the sovereignty of the People (e.g. in Salamonius, pp. 40–1, and in Mariana, 1, c. 9). But as the 'Subject' of the rights of the Ruler this 'part' leaves the Whole, and is made to form an antithesis to a separately and independently existing personality of the People, of which it is depicted as being the servant, administrator, mandatory or agent; cf. *supra* n. 104 and n. 107. All the *Monarchomachi* accordingly insist that the People is *prior Rege* in time [as well as in importance], and that it only proceeds to erect a ruler, by its own free choice, *after* it has already constituted itself: cf. Buchanan, pp. 16ff., p. 69, the *Vind. c. Tyr.*, qu. 1, p. 148 (*Rex per populum, propter populum, non sine populo*); Rousseau, c. 1, §§ 1–3, Boucher, 1, cc. 10 sqq.; Danaeus, 1, c. 4, pp. 36–44, Hotomanus, m., § 5 [*populus nam et prior et potior est Monarcha, quippe quo rectore et curatore Respublica is erat et constitit*]. Altusius is particularly emphatic in explaining that the People, (which is *temporis prior*, and which, as the constituent organ, continues to be *prior et superior* to the organs which it constitutes) first of all associates itself to form a 'body', and then—but only then—appoints *ministri et rectores* to avoid the difficulties of getting all its members to meet together. These 'ministers and

* Gierke here refers to vol. III of his *Genossenschaftsrecht*, p. 24 n. 52.

governors', it is true, *minorem populum repraesentant, quique personam gerunt in ea quae Respublicae nomen fecerunt*, but they remain *membra et membra* of the 'associated multitude', and their right of action is derivative (c. 18, §§ 5–15, 26–31, 98–106, c. 19, §§2–3, c. 38, §§ 121–2). Even so, however, and even while he thus separates People and ruler as two parts, he also describes the constituent People at the same time (c. 18, § 18) by the style of *quae Respublica* [as if it were the Whole]

The theory of contract involves a division of People and Ruler

108. In the *Vindiciae contra Tyrannos* the contrast is particularly marked between *Populus* and *Rex* as two separate 'persons', who first contract jointly with God, and then form a second contract with one another, on which it follows (1) that the king on his side has a right to take measures of correction against the People, in virtue of the contract made with God, inasmuch as he pledges himself for [the good behaviour of] the People by entering [jointly with it] into that contract (qu. 2, pp. 84 sqq.), and (2) that he also acquires rights as against the People, in virtue of the *contractus mutuo obligatorius* which he has made with it, if it becomes *rebellans* by breach of such contract (qu. 3, pp. 160 sqq.). A similar view appears in Boucher, 1, cc. 18 sqq. Danaeus also, in dealing with the relation of the Ruler to the People, applies the idea of contract strictly [to both parties] cf. 4, c. 4, pp. 41 (where he speaks of a voluntary 'pact', the violation of which extinguishes rights on both sides), 43, 3, c. 6, pp. 214 sqq. (so long as the fundamental laws are observed by the Ruler, the People on its side cannot touch the constitution or, more particularly, the royal right of succession, inasmuch as *contractus populi cum Principe et qui fundus ab omne genere fini voluntatis, perius autem facto et necessitate*, it is only in the event of the Ruler breaking the pact that the People also becomes free, or can proceed to the deposition of the Ruler and his family and an alteration of the constitution). Similar views are to be found in [Beza's] *De jure magistratuum* qu. 5 and 6 (where the idea of *mutuo obligatio* appears throughout), Hotoman, *Franco-Gallia*, cc. 13 and 23, *Quaest. illust.* qu. 1, Salmasius, 1, p. 11, Rousseau, 1, c. 1, §4, c. 2, §6 (obligatio reciproca) and § 11 (resistance and deposition are only possible *ex justa causa*); Mariana, 1, cc. 6 and 8, Hoenonius, 11, §41 (*pacto reipublicae*) and 10, §§44–54.

In the same way Althusius, while he applies the category of *mandatum*, is not prevented thereby from treating the *consensus regni inter universalis imperii* to the supreme magistrate as a contract, made by reciprocal oaths and entailing reciprocal obligations (10, 19–20, esp. c. 19, §§6–7 and 19 sqq.), which confers on the Ruler [as well as on the People] a right that is only forfeited by definite breach of contract (c. 38). He ascribes to the governing authorities full *administrative* and *representative* of the State-authority, within the limits of the constitution (c. 18, §§ 26 sqq.), though he holds, it is true, that if they overstep their 'laws and limits' they cease to be 'ministers of God and the universal association', and are only '*privati, quibus obedientia in illis quibus non potestatis limites servantur non debetur*' (ibid. §§ 41–6 and 105). He treats the contract of government as a naturally imposed element in the constitution of a State (c. 1, §§ 30–9, c. 18, §§ 90–4), and he seeks to prove its presence in all forms of State (c. 39); but in dealing with democracy he substitutes [for the ordinary contract of ruler and ruled] a contract between the community of the people, which directly exercises the rights of majesty itself, and the bearers of authority who 'represent' it successively from time to time (c. 39, §§37–9). See the author's work on Althusius, pp. 144–9.

Approximations to Rousseau

110 Some degree of approximation [to Rousseau's theory] is to be found in Buchanan (pp. 16 sqq., 48 sqq., 76 sqq.), who is reproached even by Rousseau (1, c. 1, § 4) with contempt of the right of the Ruler, and still more in Milton, who goes to the length of allowing the deposition of the king by the People, in virtue of the right of self-determination of free-born men, even if there be no other occasion than the wish for a change of the constitution (*The Tenure*, pp. 14 sqq.). But there was no thinker before Rousseau who definitely and in principle denied that there was any contractual relation between the sovereign People and the Ruler; see the author's work on Althusius, pp. 91 sqq. [Locke's theory already makes the relation between them not a relation of Contract, but one of Trust: see below, n. 68 to § 16.]

111 See Regner Sirinius, 4, c. 1, no. 43; Pufendorf, 1, c. 3, no. 10, c. 18, nos. 6–10, c. 23, no. 13; Kirchner, II, § 1; Boehmer, 1, c. 4, §§ 1–27; Alstedius, pp. 14 and 69 sqq.; Arumaeus, IV, no. 2; Otto, II, no. 14, §§ 17–19; Brautlacht, III, c. 2, §§ 5–9; Bertius, *De natura per reg.* c. 1, § 2, c. 2, § 16, c. 5, § 9, c. 6, §§ 1–2; Besold, *De reg.* 1. 1, c. 1; Tulden, 1, cc. 11–12; Wierdenhagen, III, c. 2, §§ 7–9; Lieberthal, VII, §§ 3–13; Frantzken, *De pot. princ.* §§ 19–22 and 92–101; Carpzov, *Comm. in leg. reg.* c. 1, n. 14, c. 13, n. 1; Lunaeus, *Jur. publ.* 1, c. 10, no. 14; *Cabinet* p. 532, nos. 48–79; Berckringer, 1, c. 4, § 10; see also the author's *Genossenschaftsrecht*, IV, pp. 276 sqq. [not here translated] and his work on Althusius, pp. 165 sqq., nn. 124–9.

Idea of the State itself as the true Sovereign

112 We may trace such a feeling in Bertius (c. 5, § 9), where he describes the *tota Respublica et universus ordinis et status Regni* as the *subjectum absolutum Majestatis*, and the King, in so far as *regnum translatum est*, as the *subjectum limitatum*. It may also be seen in Besold (*De reg.* 1. 1, c. 1, § 4): *magnum consentiendum est totam et universam Rempublicam per Principem repraesentari; caput sit, non totum corpus, et quemadmodum in corpore humano etiam aliarum partium functiones sunt, ita et adhuc corporis politici et populi aliqua est Majestas.* (Berckringer says the same, almost word for word, 1, c. 4, § 10.) Compare also the attempt made by Fichlau (in Conring, *Opera*, VI, pp. 976 sqq.) to interpret the doctrine of Althusius as if majesty were ascribed by him to the body of the whole association only *relative fundamenti et radicaliter* [i.e. in theory, and not in practice].

'Real majesty' ascribed to the Respublica or Populus

113. In Pufendorf, for example, we often find the *summa potestas*, which in the passages quoted above in n. 111 he assigns to the *Respublica* or *Imperium*, also ascribed to the *populus* or *universus populus* (1, c. 13, no. 1 sqq., c. 19, nos. 6 sqq., II, c. 1, no. 11). Kirchner (II, § 1) vindicates 'real majesty' for the *totalis populi coalitio*, Boehmer (1, c. 3) attributes the majesty of the *Respublica* also to the *populus*, Alstedius (p. 18) ascribes sovereignty to the *populus* or *subditi universi*, and Bertius, while he generally vindicates it for the *Respublica*, gives it equally in cc. 3, 6 and 7 to the *populus*. Besold and Tulden also identify the *Respublica*, as the 'Subject' of 'real majesty', with the community of the people, indeed, they even identify the *Respublica* with *totus populus*, when they are distinguishing it [as the possessor of 'real majesty'] from the democratic authority possessing 'personal majesty' (n. 49 supra). Lunaeus, loc. cit., expressly describes the *Respublica*, which continues to remain in possession of 'real majesty' after the creation of a 'personal majesty', as being the *universitas* or *universus populus* (see supra, n. 69). Wierdenhagen (7, c. 6) and Berckringer (7, c. 4, §§ 6–10) describe the 'Subject' of 'real majesty', which they sometimes call by the name of *Respublica* and sometimes by that of *Populus*, as *collectivum* (supra, n. 67).

The particular rights involved in real majesty

114. Thus the *Respublica* or *Populus*, as the 'Subject' of real majesty, is generally held to possess (1) the right of originally appointing the Ruler, which comes into force again in the event of the extinction or forfeiture of the powers of the authorised Ruler, (2) the right of fixing and maintaining the conditions of the contract between ruler and ruled, and (3) the right of consenting to constitutional changes and alienations of territory. It is also, as a rule, held to possess (4) the right of resistance to, and deposition of, a Ruler who has broken the contract, and (5), in addition, all other rights which are reserved by special provision when 'personal majesty' is vested in the Ruler. See particularly Bortius, on the distinction between *jura regni* and *jura regis* (c. 1, §2), on the various *jura regni* which *ad quem Respublicam*, or *ad populum, spectant* (c. 2), and on the several *jura regis sive regalia* in detail (c. 3). See also Pufendorf, 1, cc. 19, 21, 22, 23 and 30, Besold, *De maj.* 1, 1, c. 1, §§5–8, c. 6, §2, 1. 9, cc. 6 and 7, Tulden, 1, c. 11, Arumaeus, loc. cit., Lannaeus, loc. cit., Berckringer, 1, c. 4, §8.

State property belongs to the owner of real majesty

115. Cf. Besold, *De maj.* 1. 1, c. 1, §7, where a distinction is drawn between the 'patrimony of the King' and the 'demesne of the Kingdom' as regards the latter, *soola proprietas est penes Universitatem populi sive Respublicam, usufructus autem penes Regem*, and therefore there can be no alienation without the consent of the People. See also Berckringer, 1, c. 4, §8: the ownership of the demesne, as the *res Regis*, is vested in the *universitas populi*, but the usufruct belongs to the *majestas*. Cf. also Bortius, 1, c. 2, § 16.

The owner of real majesty as contrasted the owner of personal majesty

116. This is particularly emphasised with regard to changes in fundamental law, or in the territory of the State (Besold, 1. 1, c. 1, §§5 and 7, Tulden, 1, c. 11, Bortius, c. 2, §§ 14–21), and in regard to the choice of a new ruler (Bortius, c. 2, §§9–13) and the deposition of a tyrannical ruler. For the right of deposition of the tyrannical ruler, see Boxhorn, 2, c. 4, §§45 sqq. and *Dissert. polit.* c. 9, Hilliger in Arumaeus, 2, no. 13, c. 9, Frantzkius, ibid. iv, no. 42, §§92–101, Beautlacht, *Epist.* viii, c. 5, Lannaeus, loc. cit., Berckringer, 1, c. 5, and Bortius, c. 7, who argues that *contractus inquitatis, is Princeps in personam et rationem Reipublicae abutitur potestate, contra quod remedium est ut resistat populus vi, et ejus, deposito eundem; for since the Princeps ex ordine, in et pro colonorum est, et salutem Rep. procurat, dominator obligatus . . . et hoc solo cum populus potest.* The same general theory (which is applied to the tyrannical ruler) is also applied by Bortius to the case of a breach of *pacta expressa*.

Personal majesty as a proprietary right

117. The right of the Ruler to public power and public property was often conceived as a *dinglicher Recht* * Cf. R. Sohmus, 1, c. 1, no. 38 (*quasi proprietas*), Pufendorf, 1, c. 18, nos. 6–10 (*dominium merum et plenum* in all rights of government belongs to the People, but the *dominium utile*, the *usufructus* and the other *jura regalia* unknown belong to the Ruler), Lannaeus, loc. cit. (*usufructus*). According to Berckringer (1, c. 4, §§6–7) the People abandons the 'exercise' of majesty *principio*, but retains the 'substance' *cumulative*, whether we regard it as retaining that substance *retens jure et proprietate*, or whether we apply the analogy of a case of 'letting' or *locatio* (there can be no question of 'selling' or *venditio*)†. In §8, however, Berckringer simply says that the

* I.e. not as a right arising from the obligation to him of others, but as a proprietary right belonging to him *per se*, and therefore prior to obligation.

† I.e. the people as a whole retains the substance of majesty either in the simple sense of being owner, or in the sort of sense in which a person letting out property still retains a 'substance' though he has let out the control.

two 'magnates' are related to one another as dominus is to magister. Otto (§§18–19) regards the Ruler as only administrator.

118. On the variation in the treatment of imperium personale see the author's work on Althusius, pp. 168–71.

119. The statement of Berckringer (1, c. 4, §7) is obscure. He makes the people, by creating a 'personal majesty', cease to be a persona ficta, but continue to remain a persona potestas, sans corps, sed possibile. It is equally difficult to detect any clear statement in §20, where he deduces from the 'real majesty' of the *Respublica convenitur* the conclusion that the People, after erecting a Ruler, has still no Superior ruler, though it has one *personaliter*.

120. See the writer's work on Althusius, p. 171.

The People in Grotius merely an aggregate

121. This is the conception which Grotius applies in dealing with the acquisition of political authority by the voluntary or enforced subjection of a people (1, c. 3, §§8–13, II, c. 5, §31, III, c. 8), with the alienation of political authority, or some particular political right of government or property, whether by the Ruler or the People, or by both together (II, c. 6, §§13–14, III, c. 20, §13), with the loss of political authority (II, c. 9), with the right of resistance to that authority (II, c. 4), and with the obligation of the People in virtue of contracts concluded by the Ruler (II, c. 14; III, c. 20, §6). Cf. supra, notes 54, 66–7, 70, 89–90, 97.

Grotius hates popular sovereignty

122. Cf. 1, c. 3, §§8–9. It is a mistaken theory that *imperium potestas* always belongs to the People, for the people can alienate or forfeit its original sovereignty just as much as an individual can alienate or forfeit his liberty. There is also error in the theory of those *qui existunt quasdam subjectionem nihil fingunt, ut populus universus regi vestro imperandi potestatem deferat, nec autem mali imperandi populo subjectatur*. See also II, c. 4, §§1–7, c. 5, §31, III, c. 8.

Grotius on the continuity of the State

123. II, c. 9, §8: the people is the same whether it is ruled *regio vel plurium vel multitudinis imperio*, nor does it change its identity if, having been before *sui juris*, it afterwards becomes subject *plenissimo jure*. *Nam imperium quod in regio est id in capite, in populo manet id in toto, cujus pars est capitis, atque adeo regis, si electus est, aut regis familiae extincta, jus imperandi ad populum redit*. Consequently, *non derivat debere potestatem populus, regi ruit imperante, quam liber dederat, sed eam tum populus, et dominium retinet eorum quae populi fuerunt, unus et imperium in se retinet, quemquam jam non convenientem a corpore sed a capite*. For the same reason 'he who has received supreme power over a people previously free' must hold the same position in [international] conferences as that held before by the people itself: *ne, inquam, qui regis fuerit locus eum populus liber ineptiat*. Cf. also II, c. 6, §16: contracts made with a free people are always *pacta stulta*: *quae subjectio ad res pertinere ... nunc etiamsi status contutus in regnum mutetur, manebit foedus, quia manet idem corpus sed mutato capite, et ut supra dixerunt majorum quod per regem exercetur non derivat ab imperium populi*.

124. He always speaks only of 'people' and 'king', and, somewhat astonishingly, he never finds room for any technical employment of the expressions *subjectum commune et proprium*.

Grotius on Aristotle's view of the continuity of the State

The manner in which Grotius sets on one side the opposite views of Aristotle* is peculiar (II, c. 9, §8). Like other 'artificial things', he argues, the

* Gierke here refers to vol. III of his *Genossenschaftsrecht*, p. 91. For Aristotle's own views on the question, 'When is a State the same', see *Politics*, III, c. 3 (1276 a 8–1276 b 15). Actually the interpretation of these views by Grotius seems to be more accurate than Gierke's interpretation. Aristotle, as W. L. Newman says (vol. III of his edition, p. 149), 'decides that after any change of constitution the State is not

State may be considered from different points of view: *civitatis species una et communis pars et organa, altera relata partium inter se ratione quae regunt et quae regunturi; hanc spectat Politicus, illam Jurisconsultus.* Aristotle only spoke as a student of politics, and he therefore did not attempt to solve the question of the continuance of a public liability, because it belonged to *ius civile*. Grotius' mistaken conception of the argument of Aristotle (who clearly denies the existence of a public liability himself, and only leaves as an open question the appeal to legal opinion) is obvious. It is interesting, however, to notice that Grotius vindicates the 'social' [or partnership] conception of the State for jurisprudence, and the 'governmental' for political science, and thus he places himself among the jurists.

The continuance subjectum nostri actus

126. Even in dealing with the question whether acts of the Ruler are binding on his successors, Grotius, although he speaks (cf. n. 89 supra) of an intervening obligation of the *rector*, makes no use of his conception of the *subjectum continuum*; he applies instead the different idea of the Ruler's having a collective authority [because he represents the collective people] which has the effect of obliging the community at large: cf. also n. 90 supra.

Externally

128. In wars, agreements and treaties of peace it is not States as such which are involved, but their sovereigns—'those who have supreme power in the State' (I, c. 3, §4, II, c. 15, §3, III, c. 20, §2). Accordingly we often find *Rex* and *Populus liber* mentioned as alternatives (e.g. II, c. 6, §7, c. 9, §§8–9, c. 6, §16 and §31, III, c. 20, §§3–4), but we also find *Rex* or *Civitas* mentioned as alternatives with the same meaning (e.g. II, c. 15, §16).

Or internally

127. See supra, n. 66. Grotius ascribes *dominium eminens* to the Civitas, cf. I, c. 3, §6—*dominium eminens, quod civitas habet in omnia et ea omnia et omne publicum*: cf. also II, c. 14, §7 and III, c. 20, §7—*res subditorum sub eminenti dominio sunt Civitatis, ita ut Civitas, sed qua Civitas non singulis, ut rebus ita utatur prout pondere et alioquin parent.* But, here again, what he understands by *Civitas* is the community of the people, and he therefore holds that while the question of compensation concerns the relation of *Civitas et singuli*, the question of confiscation *ex iusta causa* concerns only the relation of *Rex et subditi* (III, c. 20, §10). Cf. also II, c. 3, §19, on the possible reversion of land without an owner *ad imperantem aut ad dominium superiorem.*

129. Cf. I, c. 3, §§8 and 11, c. 4, §8, II, c. 9, §6. There may even be *iniqui sub populo*, but they are not true kings.

130. Cf. I, c. 3, §§11–15, II, c. 6, §3, III, c. 8, §1, c. 20, §3.

Grotius on rights of conquest

131. III, c. 8, §1. A conqueror may also institute as will intermediate stages between the two extremes of *subjectio mere civilis* and *subjectio mere herilis*. He can also abolish the conquered State entirely, and turn it either into a province or a *magna familia* (§7). Along with his right over the *imperantes*, he also acquires the *res imperantis* and its *antiquatio jura*, inasmuch as qui *dominus est personarum, idem et rerum est et jura omnia quae personae competunt*. It follows that, even when he leaves a conquered people in possession of the *jus civitatis*, he can take away from the *civitas*, or leave to it, as much of its property and its rights as he likes (§4). On the application of the *jus postliminii** to a people, see III, c. 9, §9, and on the moral limits to the right of conquest, see III, c. 15.

the same, but that the question as to the fulfilment of contracts is a separate one". In other words, Aristotle (just as Grotius says) only makes a pronouncement on the political question, and leaves the juridical question alone, as λόγος λόγος.

* The right of reversing to a former status and resuming former privileges.

181. 1, c. 3, §13: *et in regno quae populi universitas dicta sunt, concedi non sine praestantioribus iura populi solutionibus, et alienatio regnum non vigi permutatur*

Grotius on the People as owner of political authority

182. 1, c. 3, §11, II, c. 6, §3, III, c. 20, §5. In such a case, therefore, [i.e. where the King is king by contract,] it is the people only, and not the king, who can alienate right over the State or any part thereof. At the same time, the people can only do so *accidente consensu regis*, *quae si quoque per aliquod habet, quale erga fructuarios, quod parte regnum non delet* (II, c. 6, §5), and further the consent of the part of the people concerned is also necessary when it is a question of alienating a part of a State (ibid. §4). Even alienations which are necessary and advantageous do not form an exception [to the rule that popular consent is required]; but here we may take the mere fact of silence as consent (§8). The same is also true of the granting of enfeoffments and mortgages (§9). The Ruler cannot even alienate any of the lesser rights of government (*minores functiones civiles*), so that they become the inheritable rights of the recipient, unless the people expressly concurs, or tacitly gives authority by developing a customary rule to that effect (§10). The co-operation of the people is also necessary for regulations about a regency or the succession to the throne (1, c. 3, §13). If the Ruler seeks to carry into effect alienations which are invalid, the people has a right of resistance (1, c. 4, §10), and it also possesses this right in other cases in the last resort (ibid. §11).

183. II, c. 6, §7: *territorium et totum et quae partes sunt communis populi pro ratione* a *iuber populus*, or *Rex universalis populi rationem*, can alienate without question uninhabited parts of the territory.

Grotius on the People as owner of State property

184. II, c. 6, §§11–13, III, c. 20, §5. The principle [of the people's ownership of State-property] carries the consequence that *patrimonium populi, cuius fructus deinceps sunt ad sustentandam republicam aut regis dignitatem suam, a regibus alienari nec in totum nec in partem potest*. *Res nullius* constitute no exception, except that here it is easier to argue from the people's knowledge and silence to its consent. On the other hand, the king may, as *fructuarius*, dispose of the income, and he may also mortgage effectively where, and in so far as, he has a right of imposing taxes by his own action [i.e. if the king can tax any property by his own action to get resources, he may also mortgage that property by his own action for the same purpose]

Grotius on the possible limitations of the Ruler

185. 1, c. 3, §§8, 11, 16, 18, c. 4, §§12, 14, II, c. 14, §2. Grotius distinguishes two sorts of limitation [on the Ruler], according as it affects (1) only the *exercitium*, or (2) *ipsa facultas*, and according, therefore, as action contrary to the limitation (1) is simply illegal or (2) is null and void. Even limitations of the latter sort [i.e. limitations on *ipsa facultas*, which make any action exceeding the limits null and void] do not involve any diminution of the Ruler's sovereignty, because the annihilation of his 'faculty' proceeds not *ex se ut superiori, sed ipso jure*. Nor is any division of sovereignty produced by a stipulation in favour of popular consent to laws, taxes, etc. Even the addition of a *lex commissoria*, by which the sovereignty devolved on the Ruler must in certain cases be counted as forfeit, and must therefore give way to the original sovereignty of the People, does not eliminate the exclusive sovereignty of the Ruler during his tenure.

186. The case is different, according to 1, c. 3, §11, where rule is only vested in the Ruler as a *praemium* [i.e. as a thing of which the use only is granted, for a period determined by the will of the grantor].

187 I, c 9, §§ 17–20. *Summum imperium*, although it is *unum et per se indivisum*, is none the less divisible into *potestas* and *subjectum potestatis*, and there is an actual *divisio imperii* between king and people if the people, in the fundamental contract, has reserved some of the rights of government, or has reserved a power of enforcement [of the conditions, or some of the conditions, of the contract] Cf I, c 4, § 13 there is a *jus resistendi* if the king, in a case of divided *imperium*, encroaches on 'the part belonging to the people or senate'. *Grotius on division of Imperium*

188 Cf vol. IV [of the *Genossenschaftsrecht*, not here translated], p 217 n. 44, on Lampadius and Schauchmudt cf also the author's work on Althusius, p 175 n 157

189. Cf ibid. pp 175–6.

190 F. Victoria (III, no 7) ascribes original sovereignty to the *Respublica*. *Causa vero materialis, in qua hujusmodi potestas residet, jure naturali et divino est ipsa Respublica, cui de jure competit gubernare seipsum et administrare et omnes potestates suae in commune bonum dirigere* He argues that, even after the transference of this sovereignty, the Ruler is still bound by his own laws, because he is himself *pars Reipublicae*, and his laws are to be regarded 'as if they had been passed by the whole *Respublica*' (no 23) But he expressly identifies this *Respublica* with the multitude, which is incapable of exercising political authority itself (no 8); he places the king *super totam Rempublicam*, and thereby also *super omnes simul* (no. 15), and he thus makes the active 'person' of the State always resident in the Ruler (cf also no 11) *The views of Catholic writers on the natural rights of the People against the Ruler*

Vasquez ascribes to the *populus* both original sovereignty, and, in cases of doubt, a right of co-operation in legislation and alienations of territory, which arises from a reservation to be supposed in the act of transferring original sovereignty (cc 42–3 and 47), but he describes *ipsa Respublica* as the 'Subject' of a right of resistance to a monarch who breaks his contract (c. 8)

According to Soto, the *Respublica* has the *jus ultimum regendi*, but 'by divine instruction' it transfers that right—retaining however (along with other rights) the right of deposing a monarch who has become tyrannical ['in exercitio'] The *Respublica*, which is really nothing more nor less than the sum of *omnes*, is incapable by itself of exercising its sovereignty, and only by transferring sovereignty does it become a body which has also a head and is therefore capable of action The result is that the Ruler *non solum regulat respublicam nomine superioris sui, verum et totius collatim corporis caput, totique adeo representantem, ut totum illum simul posse putat* (I, qu 1, a 5, qu 7, a 2, IV, qu 4, a. 1–2). Cf Covarruvias, I, c 1, and Bellarmine, *De laicis*, c 6 (*Respublica non potest per remotissimam eximere hanc potestatem*).

Molina definitely supposes two 'persons' in the State—the People and the Ruler. He reserves the name of *Respublica* for the community of the People, although he admits that the Ruler possesses sovereignty. The *Respublica*, he argues, originally has all authority (II, d 29, §9) it transfers it *secundum arbitrium* and on such conditions as it thinks fit (II, d. 29, §§ 1 sqq); and it recovers it, by right of reversion, if the Rulership be vacated or forfeit (V, d. 5). It preserves, in cases of doubt, the right of approving laws (II, d 29, §§6–7) it also preserves the right of property in the *bona Regni*, so that the Ruler cannot alienate any of them, just as he cannot divide the kingdom or surrender it to foreigners *non consentente Republica* ipsa, or, again, alter the constitution or the succession to the throne (II, d. 29). The *Respublica* has a right of resistance to tyrants; it can, *quoad sphaera*, remove, and depose or

punish the tyrant 'by the express will of its whole body' (III, d. 6, V, d. 3, §2). None the less, *Rex est superior tota Republica* [within the terms of the authority granted to him], and he is subject to no real *per diplomata*, since (1) the *Respublica* can only proceed against him when he 'assumes a power not granted to him', and (2) when he does so, and thus acts outside the terms of the 'grant', neither he nor the people is *Superior* (II, d. 23, §§8–10).

Suarez regularly describes the *communitas, populus, totum corpus*, or *hominum collectio*, as the 'Subject' of original sovereignty, and also of the rights of transferring and recovering that sovereignty (III, cc. 2–4) and of the reserved rights of the people which are never transferred at all (III, c. 9, no. 4, IV, c. 19, V, c. 17), and he opposes this Group-person, as the *Regnum* or *Respublica*, to the Ruler. Accordingly he terms the contract of subjection a *pactum inter Regnum et Regem* (III, c. 4, no. 5), he speaks of a *convenire Regis* to laws (IV, c. 19, no. 6), and he vindicates for the *Regnum* or *tota Respublica* a right of insurrection against a king who has become a tyrant 'in exercise', arguing that, though the people has transferred to him a real ownership of political authority, it has added the condition *si pactum non transmittere regnum*—so that, while in his essence *Rex superior est Regno*, a contingency may arise in which *tota Respublica superior est Rege* (III, c. 4, no. 6, c. 10, nos. 7–10, *Opus de triplici virtute*, pp. 1055–6).

See, in addition, nos. 62 and 67 *supra*, on the 'collective' conception of the personality of the people in the writers mentioned.

The Ruler bound by the contractual rights of the People

141. Cf. Wormannus de Erenbergk, *De regno subsidiar.*, c. 11, p. 150; Bornitius, *De imp.* c. 9 (*leges fundamentales et pacta cum populo*), c. 19 (where it is argued that the administration of parts of majesty may be devolved, so that an *imperium moderatum* takes the place of *summum imperium absolutum*), and *Part.* pp. 42–3 and 102 sqq.; Friedereich, cc. 18 and 29 (on the possible limitation and restriction of the exercise of the supreme power by certain *pactorum*); Kotzmann, I, c. 33, pp. 331–2 (on special pacts with subjects, which restrict but do not abolish monarchy); Bornius, II, c. 7. See also Molina, II, d. 29, and Suarez, III, c. 4, no. 5, c. 9, no. 4, IV, c. 17 (the Ruler may be limited in the exercise of supreme power, in legislation, in taxation, etc., by a *transitus sub conditione*, for such a conditional transference is a *constitutio inter communitatem et principem, et ideo potestas regalis non eximit modum dominium sui exercendum*).

Division of the mixed constitution as affecting sovereignty

142. We find this dualism in Aristotle (*Polit.* c. 8, §§3 sqq.; *De rep.* II, c. 6, n. 1, *De part. imp.* II, c. 1, §1): 'in deity' is mere substance, *non individuale, sed essentiale*, *non eximitur* it contains 'parts', viz. the 'rights of majesty', and though it cannot, *rationi suae non contrahitur nec partibus*, belong to a number of persons

mixtum, et diversae inter plures distributae, potest.

The mixed constitution is interpreted by most of its adherents in the same sense of a real [and not merely conceptual] division of powers, cf. for example, Grotius in n. 137 *supra*, Hedder, pp. 98 sqq., Wordenhagen, II, c. 25, Lemnaeus, *Jus publicum*, I, c. 10, Schobloteter, I, c. 16, Kotzmann, II, cc. 4–6, Lucbenthal, *vrr. qu.* 1, Berlinger, I, c. 5, §7 and c. 12, §§15–21, Felwinger, *Disc.* pp. 417 sqq. But the 'person' of the Ruler still remains a divided 'person' when the essence of the mixed constitution is held to consist merely in a division of majesty into *ideal* [or conceptual] parts, cf. Pufendorf, II, c. 1 (cf. vol. IV of the *Gesammelte Aufsätze* [not here translated], p. 418); Besold, *De statu rep. mixto*, c. 1, Tulden, II, cc. 16–17, Carpzov,

Comment in *leg reg* c 13, n 9, nos. 28–31 We find, however, in Beauld, op cit, and still more decidedly in Frantzken, *De statu rep mixto*, an approximation to the view that the partners who share supreme power only constitute the person of the Ruler when they are taken *conjunctim* Cf also Suarez, III, c 4, no 5, IV, c 17, no 4 and c. 19, no. 6 where the king needs the *consensus Regni* in *publicis comitiis* for his laws, the 'supreme legislator' is not the king by himself, but *Rex cum Regno*. Other thinkers only speak vaguely of a common capacity for the rights of majesty cf Bouvier, II, c 6, and also L de Harcq, *A Dutch Writer on the State at the Beginning of the Seventeenth Century* (in an offprint from *Nieuwe bijdragen voor rechts-geleerdheid en wetgeving*, 1880), pp 24 sqq and 35

143 Bodin, I, c 8 and II, c 1, and especially the argument (in nos 85–99) that any constitutional limitation of the true Ruler by the rights of the *universitas populi* is unthinkable, because it at once makes the *universitas populi* itself the Ruler

144 Bodin, VII, c 2, nos 640–1 (where there is a comparison of the *Respublica* to a minor) Cf also vol IV of the *Genossenschaftsrecht* [not here translated], p 249 n 156

145 Gregorius, although he has a doctrine of the Sovereignty of the Ruler which makes it single, illimitable, indivisible, and irresponsible (I, c 1, §9, V, c 1, §3, VI, cc 1–3, XXIV, c 7, XXVI, c 5, §§ 24–5 and c. 7), none the less makes a sharp division between *bona Reipublicae* and *bona patrimonialia Principis*, and he will only describe the former as being, at the very most, *quasi proprie Principis* (III, cc 2–3 and *Syntagma*, III, c 2, §§8–10) He also allows the possibility of a limitation of supreme power *per legem electionis* (III, c 7). *From the absolutist suppose a personality of the People*

Bornitius, again, while he assigns the 'person of the State' exclusively to the Ruler—by whom alone *Respublica statum adipiscitur et conservat* (*Part.* p 45, *De rep* c 5), and who stands above the People, even when they are regarded as a community, in virtue of being the 'Subject' of a single and indivisible majesty (*Part.* pp 47 sqq., *De rep* cc. 9 and 11)—at the same time refuses, like Gregorius, to recognise the Ruler's right of property in *bona Reipublicae* (*Part* pp 70 sqq), and regards limitations of absolute power as possible (*supra*, n 141).

Kecherman goes to the length of allowing the possibility of resistance and deposition even against the *absolute Imperator*, though he makes the exercise of these rights more difficult in that case than it is against the *Monarcha certis pactis et conditionibus astrictus* (I, c 28, p 431)

According to Claudius de Cerum, *Regia potestas* and *Respublicae potestas* are identical (I, c 10), inasmuch as by natural law the *Respublica* necessarily transfers, without any reservation, the whole of the power which rested originally in itself (I, c 9), but the *universitas populi* continues to be necessary for legislation (I, c 9)

Barclay [unlike these thinkers] recognises no rights of any description as belonging to the People According to his argument every true monarchy is absolute, and its existence is incompatible with any limitations, or any division of power, imposed by fundamental law (II, IV, V, c. 12) All the rights of the People are transferred, and thereby cease to belong to the People (IV, c 10, VI). *insurrectio adversus Respublicam dissolvitur Regi* (IV, c 23); there is never any right of resistance or deposition (III, cc 4–16, V, cc. 7–8) In Barclay, however, there is no question of any theoretical construction of a State-personality [i e he does not get beyond the conception of the personal

king to a conception of the impersonal '*persona Civitatis*', which might have involved him in problems of the relations of the king to this *persona*].

Aristotle on the Ruler and the societas of the ruled

140. Cf. *Pol.* c. 6, *De rep.* 1, prooem. §§ 4 sqq. and c. 5, n. 3–5. He thus assumes that, when the form of the State is changed, the *Respublica* disappears but the *Civitas* remains, and he states the question which Aristotle raised in connection with such changes* in the form, '*Quatenus acta Respublicae obligant Civitatem?*' His conclusion is that 'contracts made by the *Respublica* only' do *not* bind 'the whole *Civitas*' on the other hand 'contracts made by the whole people', and 'agreements made and expenses incurred for the welfare of the *Civitas*' (in regard to which the 'tacit consent of the people' is to be assumed) continue to hold good 'if the *Respublica* disappears'. He also contrasts the personality of the People with that of the Ruler in other connections, and, more particularly, he refuses to include within the scope of the Ruler's 'majesty' the right of property in the territory and belongings of the State (*De jure maj.* III, c. 1). But he entirely excludes the People as such from all the rights of the *Respublica* (*De rep.* II, c. 2, n. 5, c. 3, n. 8; *Pol.* c. 14; *De cives praefatio et epistolae*, pp. 2–3, *De jure maj.* 4, cc. 5, 6), and he accordingly holds that where a monarch is limited by the constitutional rights of the People, there is no longer any question of a true monarchy, but only of a *forma mixta* (*De cives* etc. c. 1, §§ 4 sqq., *De jure maj.* 1, c. 6). It follows that the *Respublica*, which includes and connotes the whole authority of the State (*De rep.* 1, c. 5, n. 3), is identical with the Ruler, and the 'person' of the *Respublica* can therefore be also expressed by a personification of his *majestas* or *dignitas* (*De rep.* 1, c. 3, n. 4, *De rep.* III, cc. 1 and 8). More especially, the immortality of his *dignitas* serves as a means of securing the continuity of the *Respublica* in the event of a change in the line of succession. 'So far as the rights of majesty and the *status imperii* are concerned', the successor to the throne is bound by the contracts (though not by the decrees) of his predecessors, where such contracts have been made *nomine dignitatis, et pro Republica*, in regard to matters appertaining to the dignity itself, but 'in matters appertaining to the fisc' [i.e. in his own private treasury, as distinct from the public funds], he is only responsible as heir (*De jure maj.* 2, c. 7). Between the 'person' of the State or *Respublica*, as thus conceived, and that of the People, there may be an *obligatio inaequalis*, but there can be no really effective contractual relation (ibid. c. 6).

Hobbes' version of contract

147. *De cive*, c. 5, *Leviathan*, c. 14, c. 17. *Imperium a mutuoque omnium pactum dicunt. Ego haec formam, vel hanc causam, constituendae et jus suum regendi ac quasi concedo, ut conditionem, ut in quaque hanc institutionem et jus suum ius regendi in alterum transferam.* Cf. the author's work on Althusius, pp. 86 sqq., 101 sqq., and for different conceptions see pp. 341 sqq.

Hobbes repeats the idea of the People as a 'person'

148. *De cive*, c. 6, § 1, c. 7; *Leviathan*, c. 19. In particular he argues that the assembled people, even when it wishes to retain supreme power, cannot continue to be a 'person' unless it immediately transforms itself into a *concilium* regularly meeting and deciding questions by a majority-vote, which involves a devolution by all and single of their whole personality, through a mutual contract, upon the democratic Ruler as one *persona* (*De cive*, c. 7, §§ 5–7). In an aristocracy, the constitution of a *coetus optimatum* to rule as 'a single person' means that the people immediately 'ceases to exist as a single person' (ibid. § 8), and is 'at that moment dissolved' (§ 9), 'being no more

* See supra, n. 124.

a single person, but a dissolute multitude' (§ 10). Similarly, if a monarch be chosen, *populus statim atque id factum est personae non desinit* (§§ 12, 16).

149. *De cive*, c. 6, § 10, c. 7, §§ 7, 9, 12, 14, 17; *Leviathan*, c. 19. The monarch in a monarchy, the Senate in an aristocracy, and the majority of the people in a democracy, are all *sine obligatione liberi*, they are not bound by any contracts made with individual subjects or with the whole body of subjects, they are not even pledged by any oath they may have taken. They cannot therefore do injustice to their subjects, either as individuals or as a whole. Any reservation of the rights of the People in a democracy, by means of a contract made at the time of the institution of the Ruler, is inconceivable, because the People was not a person before the establishment of the principle of majority-rule, and the only contract which was possible at that time was merely a contract between individuals and individuals. A similar reservation in an aristocracy, or a monarchy, would be null and void, because the people receiving the promise [that its reserved rights will be observed] disappears as a person with the institution of the aristocratic or monarchical Ruler, 'and when a person disappears, all obligation to that person disappears also'. A contract between the Ruler, after he has been instituted, and the People, is impossible, because all that then remains over against the sovereign is merely a 'dissolute multitude'. Nor can any legal nexus of any sort exist as between the Ruler and his individual subjects, because the will of individuals has been merged entirely in the sovereign will. *Hobbes refuses to admit a contract of Ruler and People*

150. *De cive*, c. 5, § 17, c. 6, §§ 4–20, c. 7, c. 12, §§ 1–7, c. 13, c. 14, §§ 90–93, *Leviathan*, cc. 18, 19, 21, 23, 30.

151. *De cive*, c. 6, §§ 17–19, c. 7, §§ 4 and 15–17, c. 12, § 5, *Leviathan*, cc. 18, 29.

152. See *supra*, nos. 84, 86, 87.

153. Hobbes' account of the similarity and difference between the monarchical and the republican sovereign illustrates particularly how much he identifies the 'personality' of the Ruler with the physical substance of a man or a body of men. The republican sovereign only really exists for him as long as it is actually in session; in the interval it sleeps, and this sleep becomes death if the right of meeting at its own discretion be lost. Cf. *De cive*, c. 7, §§ 6, 10, 13 and *Leviathan*, c. 19, and especially *De cive*, c. 7, § 16, with the acute deductions in regard to temporary monarchies which are derived from this principle. *Sovereignty is Hobbes a physical fact*

154. *De cive*, c. 5, §§ 6–11, *Leviathan*, c. 17. This contract is more than a 'consent or concord': it is a *real union of persons, in personam civitatis coit omnium unus*. By it 'the wills of all are reduced to one'; it *unus fiat ex omnibus Personam quae omnipotens singulorum, atque omnipotentiam omnibus se fatetur suae actionem emittere, quae quasi Persona illa, quoque voluntate et judicio voluntatem suam subiicitur*. *The Sovereign is Plurality Representative*

155. *De cive*, c. 5, §§ 9–10, 11, c. 6, § 1, *Leviathan*, cc. 16–18, 22. Hobbes declares absurd the opinion of those who say, 'of Kings bearing the Person of the State', *quod sit singulis majoribus, omnemque totam multitudinem non nisi per tumorem intelligunt Caudam Personam, quam intelligunt Regem, itaque Rex solus minor est, quod est absurdum, non per minorem multitudinem intelligunt totum, singulos intelligunt, itaque Rex, qui major singulis est, major quoque est omnibus, quod iterum est absurdum.** Most thinkers are, however, in Hobbes' view, unable to see how *Caudae in Personam Regis coalescat* (*Leviathan*, c. 18).

* See the statement of this argument in the English version of the *Leviathan*, c. 18, at the beginning of the third paragraph from the end of the chapter.

The People without a Ruler a mere multitude

156. Hobbes is never tired of drawing out the distinction between a community constituted as a person and 'a dissolute multitude to which no action or right can be assigned', or of describing the people without a Ruler as a mere 'multitude' cf. *De cive*, c. 6, §§ 1–9 and 20, c. 7, §§5, 10, 16, 18; *Leviathan*, cc. 16, 18, 19. He will not even allow the name of 'people' to be applied to such a body, and he remarks (*De cive*, c. 12, §8) that it is a mark of revolutionary opinion *quod homines non satis distinguant inter populum et multitudinem*. The 'people' is a unity with a single will and activity; the 'multitude' is not. The 'people' rules in every form of State, and even in a monarchy (for 'the people wills by the will of one man'): the 'multitude', in all forms, opposes the subjects. *In Democratia et Aristocratia caput est multitudo, sed corpus est populus; at in Monarchia habitat caput multitudo, et (quemquam paradoxum sit) Rex est populus*. If, following the vulgar use of language, we call the masses by the name of 'people'—if we speak of (what is totally impossible) a rebellion of the *civitas contra regem*, and describe the will of discontented subjects as 'the will of the people'—we are involving, *sub praetextu populi, cuncta contra contrarium, hoc est multitudinem contra populum*.

The Ruler as soul of the body politic

157. *De cive*, c. 6, §19: the usual comparison of the Ruler to the head is false; a comparison of him to the soul is the only proper comparison, because the soul is the instrument of the will, and it is through the instrumentality of him *qui summum habet imperium, et non aliter*, that 'the State has will', *et potest velle et nolle*. The chief council is a better analogy to the head; cf. *Leviathan*, Introduction and c. 19.

Hobbes on the personality of the State

158. Cf. supra, notes 100 and 101; *De cive*, c. 5, §9, §10, c. 6, §1, c. 10, §8, *Leviathan*, cc. 17–19. Hobbes' very definition of the State already includes the attribute of personality. In the *De cive*, c. 5, §9 (after an account of the institution of a 'civil person' by means of a union of wills, and an explanation of how this 'person' differs from individuals, and even from *unitas moralis*, *in simplicibus non esset coherentia ad pro voluntate omnium*) we get the definition: *Centum ergo (ut sum definivimus) est persona una, ergo coherentia et pactis plurium hominum pro voluntate hujusdam est quasi omnium, ut singulorum vinculis et fundamentis sit potest ad pacem et defensionem omnium*. A similar definition also occurs in the *Leviathan*, c. 17. Here, after giving an account of the contract made at the time of the State's foundation, he continues, *quo facto multitudo ita una Persona est, et vocatur Civitas et Respublica, atque haec generatio est magni illius Leviathan vel—ut dignius loquar—mortalis Dei, cui pacem et protectionem sub Deo immortali debemus omnes*. Then follows the definition—'A State is one person, of whose actions a great number of men have made themselves authors by mutual agreements one with another, to the end that he should use the power of them all at his own will for peace and common defence'.

Contemporary writer similar to those of Hobbes

159. About the same time as Hobbes (1640) Grotewohl developed an absolutist theory of indivisible and alienable 'majesty' (*potestas una, summa in se, et absoluta*) which held the same position in the State as God in the Universe or the soul in the body, and excluded any independent right in any other part of the State [cf. n. 93 supra]. But Grotewohl failed to attain the conception of a single and homogeneous State-personality, and his failure was due not only to the theocratic bias from which he started (cc. 1–3), but also, and indeed primarily, to his dualistic conception of the nature of 'majesty'. He maintained the distinction between 'real' and 'personal' majesty; and all that he contended was that the one *might* [on occasion] exclude the other. E.g. 'real majesty' exists to the exclusion of 'personal

majesty' (*a*) in a Republic, (*b*) in a monarchy during an interregnum, (*c*) when it appears as a source of fundamental laws, and (*d*) where the monarch is *Rex sub conditione*. Conversely, the 'personal majesty' of a *true* king includes 'real majesty', which thus disappears as a separate entity (cc. 10–11).

Salmasius, in the *Defensio Regia* of 1651, is already obviously under the influence of Hobbes. Like Hobbes, he regards the *universitas populi* or *universitas*, in a true monarchy, as a mere aggregate. He holds the original rights of the people to be entirely merged in the sovereignty of the king, arguing that these rights only belonged to *omnes collective sumpti*, i.e. to the people as a *corpus*, and that the king has taken the place of such *corpus* (*unus vicem corporis*). He depicts the king as the one representative of the unity of the people (*unus vicem totius populi*), and he holds that there is no community of the people confronting him which is capable of exercising any rights (cf. esp. c. 7). Salmasius, however, does not attempt to deduct any conception of the personality of the State from these ideas.

§15. THE NATURAL-LAW THEORY OF ASSOCIATIONS [*DIE ENGEREN VERBÄNDE*]

The position of the Family in political theory

1. Bodin, who includes in his initial definition of the State the fact that it is composed of families (1, c. 1, no. 1), vigorously defends against Aristotle* the propriety of making the theory of the Family a part of Political Science, on the ground that the family is both a fundamental element in and an 'image' of the State (1, c. 2), and he proceeds at once (1, cc. 3–5) to treat in detail of the three powers which exist in the family [the power of the husband, that of the father, and that of the master]. Arnisaeus takes a similar line, *Polit.* cc. 2–5 and *De rep.* 1, cc. 1–4; see also Danaeus, 1, c. 3; Gruger, *dep.* 11; Heider, pp. 32 sqq.; Velsteanus, *dec.* 11–111; Borninus, *Pert.* pp. 38 sqq.; Lechenthal, *dep.* 11–1v; Ohnsorgius, lib. 1.

On Besold's treatment of the three family societies and the general family-community which they compose, see vol. 1v of the *Gesamtverfassungslehre* [not here translated], p. 15. Gregorius does homage to a similar point of view (1, c. 8), but he does not discuss the Family in any detail. Conring also holds that it is only *societates domesticae* and the State which have their origin in Natural Law: cf. *Disc. de republica*, Op. 111, pp. 763 sqq., and *De necessaria conditione partium*, ibid. pp. 748 sqq.

2. This is the line taken by Bodin, 1, c. 6; Arnisaeus, *Polit.* c. 6, *De rep.* 1, c. 5; Gruger, *dep.* 111; Heider, pp. 85 sqq.; Velsteanus, *dec.* 1v–v; Borninus, *Pert.* p. 40; Lechenthal, *dep.* v; Ohnsorgius, lib. 11–111.

3. Bodin first treats of corporations in his third book, under the head of

* Aristotle, in the beginning of the *Politics*, where he is controverting the *Politeia* of Plato, distinguishes the theory of the Family from that of the State. Later, however, in the course of Book 1 and the beginning of Book 11, he deals largely with the theory of the Family as a part of the theory of the State.

The treatment of groups as subjects of administrative law

administrative law. Here he describes, as *Reipublicae partes ac salutis munera singula, quae pertinent Reipublicae quam ipse diligenter*, first the Senate (c. 1), then the officials (c. 2) and the administrative boards (cc. 3–6), after that the corporations (c. 7), and finally the Estates (c. 8).

Gregorius similarly brings under the head of administrative law his account of the advantages and dangers of corporations (*De rep.* xiii, cc. 2–4). He regards corporations as being mere institutions of positive law after the State has once been formed—although, in the same context, he refers to the natural development of an ascending series of groups [while the State is being formed] (ibid. c. 2, §2).

Arnisaeus, in his comprehensive treatise on politics, only devotes a few scattered sentences to local communities and corporations at the end of his theory of the *civitas regularis* (c. 12, p. 133). Bornitius simply treats associations as subdivisions of Estates (*Pari.* p. 72), and many other political theorists similarly consider local communities and corporations merely as political divisions of subjects—cf. Hesler, pp. 368–71; Hoeconius, *disp.* 2, §§50–7; Velthemius, iv. qu. 8–9; Bumai, 1, c. 13 (in a context in which the family has also been previously treated in cc. 10–11, and the institution of chieftainship in c. 12); Kirchner, *disp.* xiv; Liebenthal, *disp.* v, §§1–78. We often find associations completely omitted by political theorists (e.g. Cruger), and still more often by the theorists of natural law (e.g. in the treatises cited above, §14, n. 2).

4. This is particularly the case with the ecclesiastical theorists of Natural Law, and more especially with Molina and Suarez.

Bodin's classification of collegia

5. Bodin, distinguishing *collegia rerum divinarum ac publicae potestatis* from *collegia rerum humanarum*, divides the latter into those which have 'jurisdictum', and those which have not. In the former category of these secular 'colleges' he includes only 'magistrates and judges', in the latter, 'colleges' for the *educatio juventutis*, and *mediatorum, scholasticorum hominum, mercatorum, opificum, agricolarum subditis* [such colleges thus being either educational, or professional, or occupational]—see loc. cit. no. 990.

Later, in dealing with the 'powers of colleges', he gives pre-eminence to the 'colleges of magistrates and judges', as being *praecipua*, because they *sunt solum collegia regulae ac collegia totius numerum partium, sed caetera quaque religiosorum et opificum collegia, pro jure suae potestatis moderantur et coercent*. These corporate bodies of judges and magistrates are distinguished from other 'colleges', which are only concerned with their own particular negotia communia, by the fact (*a*) of their handling non non sua *aliena negotia*, and (*b*) of being constituted *potestate alienae quam sua civitatis*. But they too 'must rightly and duly administer law for their own members, individually as well as collectively', before they assign rights to others. Bodin adds one qualification. The right of a college to exercise jurisdiction itself over its members is a right which is only to be recommended in the case of the 'most prudent' colleges: for other colleges, the jurisdiction of superior colleges and of the Prince is preferable (nos. 992–3).

Bodin on the rights of private 'colleges'

6. Bodin argues that these other colleges [i.e. colleges other than those of magistrates and judges] *jurisdictione et coercione carent*, and have only a 'right of coercion and moderate castigation' within the limits of their statutes: even Frederick II assigned no more power to Rectors of Academies and headmasters of schools. Where *collegia religiosa* cum *contentis* are in question, the *judex ordinarius* has to decide how far a penalty or sentence of expulsion

imposed by a college is admissible. Any rule to the effect that disputes between members must only be brought before the college has no validity in *causis et judiciis publicis*, and in *privatis judiciis* the decision of disputes by a college is only valid when it takes the form of an 'arbitral award'—and even so it must be passed by a unanimous resolution. The summoning of a meeting by the senior members or officers binds nobody to appear, unless the summoner *majorem habet*. Failing that, recourse must be had to the government in order to issue a binding summons, but only moderate penalties can be imposed on those who absent themselves, even when such a summons has been issued. *Collegia* and *universitates* may issue edicts, *intra legibus*, but they must not even discuss what is forbidden to them by law, or anything that is not included in the sphere of their corporate affairs (nos. 333–7).

Bodin on corporate property

7. Loc. cit. no. 331 (*actor communis* is no more necessary than an *universus communis*); see also no. 332 (a 'college' can only acquire a capacity of inheritance by a special privilege to that effect [cf. the modern French rule which requires administrative authorisation for the acceptance of a gift or legacy by an *établissement public*]), the idea of a corporation does not necessarily require a capacity of inheritance, or even of acquisition).

Bodin on the offence of corporate bodies

8. Although *universitas non potest peccare, nisi ex consensu populi*, Bodin holds that, in consequence of the identification of the majority with the whole body, penalties may be properly imposed on the corporate body (such as withdrawal of the right of meeting, cancellation of privileges, fines, and confiscation of property), if an offence has been committed after proper discussion and decision in due corporate forms. On the other hand, he would spare innocent individuals from incurring penalties which affect their body or life—or even their property, so far as it is possible to distinguish their property from that of the corporation. For the rest, basing himself on a full review of historical facts and on political considerations, he advises the following of a just mean between severity and excessive clemency (nos. 337–40).

Gregorius Tholosanus on the same theme

9. Gregorius, after speaking of the origin and the various species of ecclesiastical and secular corporations, and after limiting drastically the scope of *collegia licita* (*De rep.* xxii, c. 1), proceeds to discuss in his next chapter (c. 3), with an unusual wealth of detail, the offences of corporations (especially those of monopoly and heresy), and the three *remedia* which the sovereign can apply in dealing with such offences. They are (1) *reformatio* ordinances (by way of changes, prohibitions, variations and penalties, §§2–15), (2) abolition (§§15–27), and (3) a rule to the effect that *non permittendae sunt factiones neque religiones aut collegia* (c. 4). In the course of this argument there is no mention of any legal limits on the sovereign power. Cf. also xiii, c. 19 (on offences of fraternities and their suppression) and xxxi, cc. 3–4 (on 'factions and conspiracies, and their remedies'). On the juristic treatises of Gregorius, see above [vol. iv of the *Genossenschaftsrecht*, not here translated], p. 60 n. 2, p. 65 n. 17 and p. 91 n. 90.

Barnhart's theory of corporate bodies

10. Hopfnius demands that 'for the preservation of the State', persons should be divided into three Estates (*Pars*, pp. 68 sqq.), and these Estates should be subdivided in *alias partes, quae collegia dicuntur, ut ex natura et factione res manere aequales possint* (p. 72). Each of these colleges—including, in the spiritual Estate, those of priests, professors, doctors and the like; in the political, those of magistrates, judges and councillors, and in the private

Estate, those of agriculturalists, merchants and artisans—*ex contractu Principum factum et concessum*. The colleges, when formed, are then united to form a *corpus*, and a number of *corpora* are finally united to form a *universitas* * For the most part they have *suum politium in pari, legibus, privilegiis, pactis, magna administrandi forma*, but the rights of *collegia et status privati* [i.e. in the third or 'private' Estate] belong only to the sphere of private law as a *jus quasi speciale* (p. 93), and such private colleges, like families, can only have a *politia privata* (p. 105). Cf. *De iure* cc. 14–99 (where it is argued that a grant by the State is always necessary to justify collegiate self-government, *jurisdictio*, the choice of officers, *jus conveniendi*, the right of taxation, and the like)

Arnisaeus on corporate bodies

11 Arnisaeus (*Polit.* c. 12), at the end of his theory of the *subditi majoris*, speaks of their division into certain classes, ut *subditi certiusdem gubernari per jussa et imperia majoris partis*. In this connection he discusses *collegia, corpora* and *universitates* on the basis of Bodin's scheme. He rejects entirely any toleration of associations without 'the consent and the confirmation of the State', but he allows to colleges a power of making rules *de rebus suis et ut collegiis*, and also, by authority of a special grant to that effect, a *jurisdictio ut collegii*. Similarly, in his *de jure majestatis*, he interprets all corporate authority as the result of a 'concession' made by the State, except in so far as it is merely the exercise of a power to enter into contracts or of other rights at private law. cf. II, c. 2, §§8–9 and III, c. 7, §10.

Besold on corporate bodies

12 This is the argument, essentially based on Bodin, which we find, e.g. in Velutenus, *Dec.* IV, qu. 8–10, Hesler, pp. 268–71, and Lichenthal, *Disp.* V, §§1–78. Besold takes a more independent line. he starts by distinguishing the State, as the all-embracing *universitas*, from a *universitas* such as a local community or a *collegium* (I, c. 3, §3), and he then proceeds to treat particularly of *collegia et corpora*, which he considers to be identical (I, c. 13). He defines a corporation as *universitas plurium civium, qua in certam aliquam formam constituitur secundum id constitutionem civilem*. he refuses to tolerate any other associations than those which are authorised by the State. he recommends an extreme prudence, which will allow only useful corporations, will admit no discussion of public affairs, will only recognise 'statutes' [or by-laws] as 'private agreements', and will permit only private, but not public, associations. He also refuses to allow any liberty of meeting. Cf. Hartog [as cited in §14 n. 148], pp. 15–16 and 20–1.

13 Cf. supra [vol. IV of the *Genossenschaftsrecht*, not here translated], pp. 110 sqq.

14 Cf. e.g. Oldendorp, *Isagoge*, I, p. 181; Winkler, V, c. 3 and c. 4, where a distinction is drawn between *respublica majestatis* and *respublica municipalis*. Winkler argues that 'majesty' has, 'of itself and in its own right', the whole of the authority of government, but he adds that *concedatur etiam magistratibus provincialibus aut municipalibus, ut pro modo jurisdictionis sibi commissae legem ferant, sed haec omnia procedunt ex subditis majestatis, non jure proprio*.

Modern political writers inferior to Greeks

15 In this sense we find Covarruvias arguing (*Pract.* qu. 1, c. 4) that the 'supreme jurisdiction of the king' (which he calls the '*Majestas*') excludes any independent right of nobles, or of Cortes, if the king himself takes action. It is only when the king fails to make provision, or is prevented from doing

* Does this mean that the colleges in any one Estate form a *corpus*, and these *corpora* in turn form the *universitas Regni*? Bodin has a somewhat similar view of the relations of *collegium, corpus* and *universitas*; but his *universitas* is only a local community (cf. pp. 64–65 supra).

so, that a sovereign can appoint a *Rector* for itself. Molina (v, d. 3, §§3–5) ascribes all *jurisdictio* to the *totis Reipublicae*, and therefore to the king, with the result that magnates, towns, and the like, can only have a 'derivative jurisdiction'; cf. c, d. 666, and Lessius, II, c. 33, dub. 2, on the right of taxation.

16. Suarez (I, c. 8) divides *potestas praeceptiva*, which can issue commands, into *potestas dominativa* (or *oeconomica*) and *potestas jurisdictiva* (or *politica*). The former may be found even in an 'imperfect community' [e.g. the Family], for (*a*) the father has [naturally] a *potestas dominativa* over his child, and (*b*) such power may also arise from contract—either under natural law, through an agreement of marriage, or under positive law, through voluntary entrance into a relation of service. The *potestas jurisdictiva* is confined to the 'perfect community'. Only a 'supreme head' can have the legislative authority on which a *potestas jurisdictiva* follows, and an *inferior* can only exercise such authority within the limits in which it has been 'communicated to him by the head'. *Suarez regards all real authority as belonging to the State*

17. According to Suarez (III, cc. 2–3, 9) legislative authority, in the sphere of *leges civiles*, belongs only to sovereigns. This notion that it belonged originally to the People, and has subsequently come to belong either to *Reges supremi* (and, in addition, other 'princes without a superior', and territorial princes subject to the emperor who have been duly enfeoffed as sovereigns), or to sovereign republics. *Per contra*, according to Book III, c. 9, nos. 15–21, the 'statutes' [or by-laws] of 'communities' have inherently nothing of the nature of *lex*. The 'statutes' of *civitates minores* [*civitas* being here understood to signify an Italian city of the mediaval type], in the form in which they are recognized by Bartolus,* are either mere *pacta*, or *praecepta homines temporalia, non sunt praecepta patresfamilias in domo sua*, and even the enactments of *civitates maiores* and *regnae* (species which ought not properly to be distinguished) are really either *pacta*, or (as Baldus holds) simply the expression and outcome of *jurisdictio*. The real question [when we are discussing the legislative powers of a municipality or *civitas*] is whether (1) the *civitas* is a 'free people', and, as such, *retinet in se aliquam potestatem supremae reipublicae et per illam se ipsam gubernat*, or (2) *illam* [sc. *potestatem*] *simpliciter transtulerit in aliquem principem, vel quidem alia pacta ratione* [*potestas illa*] *translata sit*. It is only of the former of these two alternatives that the *Lex* 'omne populi' speaks. The moment a city is 'subject to some supreme Prince', it can no longer make laws *ex potestate propria*. At the most—and then only by virtue of a reservation made by itself at the time of 'transference', or as the result of a later 'concession' made by the sovereign—it is able *statuere de rebus ad meam peculiarem gubernationem et administrationem pertinentibus*. In other respects [i.e. apart from these particular matters] it needs the 'confirmation of the superior'. What is true of cities is similarly true of provinces, and particularly of *conjunctae regnae*. *Suarez on the rights of municipalities*

A similar view appears in I, c. 8, no. 5 and II, c. 7, nos. 8–10. Cf. also VI, c. 26, nos. 4–25. *magistratus civiles aut reipublicae inferiores et civitates subjectae* can never establish any rule which runs contrary to the *jus commune* of the State, the Superior, on his side, can abrogate even the *statuta* which he has confirmed, but the *statuta* themselves have no such power of abrogation.

* On Bartolus, and his doctrine of the *civitas sibi princeps* (the Italian city-state as 'its own prince'), see G. N. S. Woolf's book on *Bartolus of Sassoferrato*, pp. 113 sqq.

if the confirmation he gave was *mentalis*, or if, even though it was only *verbalis*, 'the Prince by confirming [a statute] made it his own law'—which is to be presumed the case.

Suarez on the validity of custom.

18. Cf. vii, cc. 1–20. According to c. 3, nos. 8–9, c. 9, nos. 5–11 and c. 14, no. 4, a 'private person' or an 'imperfect community' (*uno famulo*) can pass neither a *lex expressa* nor even a *lex tacita*: they can only establish a *praeceptum*, or a *statutum*, *per modum pacti seu mutuae sponsionis*—and the 'precept' or 'statute' must be clearly expressed. On the other hand, any 'perfect community' (*civitas, populus, congregatio ecclesiastica*, [*civitas*] *monasterii*) may *consuetudinem introducere*, inasmuch as, passively regarded, it is *legis capax*, and, regarded actively, it can make laws *et conferre principi vel familiaribus ab eo habenda*, although its inherent power extends only to the making of *statuta consuetudinis*. None the less (according to cc. 13, 14, no. 5 and c. 18), the consent of the Prince is always necessary [to the validity of customary rules], whenever 'the people itself is not the supreme Prince'. In the case of communities with a power of making rules, this consent can be given by a general authorisation; in the case of other communities, the *de facto* toleration of a 'prescriptive custom' is adequate, but otherwise an act of personal assent is necessary—though that assent may be given tacitly, assuming always that the Prince is cognisant of the usage in question.

Suarez on taxation.

19. Cf. v, c. 14: only the sovereign can exhibit *imperium*; it is consequent on the nature of 'majesty' that any other person—though he may acquire a right to the exaction of traditional dues—can never acquire a right of taxation, and similarly, while the sovereign may grant to an inferior *ut nomen et auctoritate sua tributum imponat in particulare casu*, he cannot make a valid grant to an inferior of 'the general privilege of imposing a tax independently of his own appreciation', since such a privilege would offend against the nature of the State and the *supreme potestas*.

Suarez on religious congregations.

20. Thus the answers given by Suarez (iv, c. 6) to the question, *Quae communitas seu congregatio ecclesiastica habeat potestatem legis condendi*, depend entirely on the fundamental principle that any autonomy belonging to ecclesiastical associations must either be the result of an 'ecclesiastical jurisdiction' granted by the Pope, or, if it takes the form of passing by-laws, then such by-laws can only be *regulae operandi pactae et convenientes interse per modum contractus*: see especially nos. 18–19, 19 and 21.

The corporate body reduced to a mere partnership, like the Family.

21. Thus in Gregorius (xxx, c. 7), Velutcnus (*Decr.* iv) and Lutbenthal (*Disp.* v), *collegia, corpora* and *universitates* are reckoned as *societates*. In Heider (pp. 268–71) they are contrasted, as *societates privatae*, with the *societas publica* of the State. Bodin (i, c. 8) compares families and corporations, without suggesting that there is any difference between the idea of family authority and that of the authority of the corporation: in his view families are already competent to make *statuta* (e.g. 'house-laws' [like that of the Habsburg family], or contracts of mutual inheritance), and he only refuses to allow the making of such *statuta* to *familiae obscuras* (no. 13). It has already been mentioned (*supra*, n. 10) that Bornitus assigns the rights of corporations proper [*collegia et status privati*] to the sphere of private law. Arumaeus (*Polit.* iii, c. 18) also reduces the internal rights of associations to the level of the rights of 'societies' [or partnerships] (*supra*, n. 11, *ad finem*).

22. Bussus (i, c. 19): their rights *exhibentur propio jure societatis*, but with some modifications, e.g. they are not dissolved by the death of their members, and they can act on the majority-principle, see n. 12 *supra*.

Continued use of the Roman law of corporations

23. The traditional [Roman-law] theory of corporations is reproduced almost in its entirety in Gregorius (cf. also xxii, c. 2, § 7 on *hospitalia* and *loca* regarded as *collegia*), in Bonifil [see vol. iv of the *Grundrechtsfreunde*, not here translated, pp. 11–18], and in other writers. Some of the essential parts of that theory are also reproduced in Bodin, in Molina (cf. e.g. ii, d. 9 on the property of corporations, d. 300 on loans to an *ecclesia* or *conclave*, and d. 336 on *hypothecae* made of the property of the administrators of a corporation), in Suarez, and elsewhere.

Bodin's distinction between 'distributive' and 'collective'

24. This is the view adopted by Bodin (iii, c. 7, nos. 334–6), when he draws a line of division between (1) affairs in which every *singulus* must agree, because there is a question of a right belonging to all the members *seorsim* as *communione*, and (2) affairs in which the majority decides, because *jus universum* is concerned. Cf. Oldendorp, op. cit. i, p. 163, and Lieberthal, *Disp.* v, §§63–77. It is on the basis of this view that Bodin argues (loc. cit. no. 331) that it is compatible with the idea of a 'college' that there should be a *praepositus collegii* who has *imperium in collegas* [i.e. over each distributively], but not that there should be a *praepositus* with *imperium in universos* [i.e. over all collectively], as there is in a *consortium*, a *gynaeceum*, or a *familia*. Arnisaeus takes a similar line, op. cit. p. 133.

But he also assumes a fictitious personal

25. Thus Bodin (loc. cit. no. 331), in spite of his description of *jus collegii* as *jus universum*, argues in favour of the continuance of this *jus collegii* until it is legally abolished, even when all the members [*collegas singulos*] have disappeared—declaring that it is folly to identify the *collegium* with the *collegas*. [He thus assumes that a college is a fictitious individual, distinct from its individual members.] He also regards the capacity of owning property, and particularly that of inheriting it, as a special privilege granted to the *collegium* [as a fictitious individual].

Bodin on the majority-principle

26. Bodin (loc. cit. nos. 334–6) deals in detail with the validity of the majority-principle, recognising that principle in so far as there is nothing to oppose it either in *jure singulorum* or in *legibus sive jus quo collegia creantur aut quaque praescripta imperio sui solvere possint*. But majority-decisions, he argues, require a regular meeting, and the presence of two-thirds of the members, and then *plus possunt duae partes ceteris quam omnes simul sumptae*. They bind the minority, and all individuals, but they do not bind the whole body itself or the majority. The majority can always abrogate its decisions, as the sovereign can abrogate a law, or the testator a will, or contractors a contract, and this is the case even with a unanimous decision, if the question concerned is one *de jure universorum*, though not if it be one *de jure singulorum seorsim*. Bodin mentions, in this connexion, that he had himself prevented a decision of two of the *Ordines Franciscani* which would have cured to the detriment of the Third Estate.

27. Cf. Bunus, supra, n. 12; Arnisaeus, *De maj.* iii, c. 7, § 10 ('ex consensu').

28. Cf. Bodin, loc. cit. nos. 337–42 (supra, n. 6), and Oldendorp, loc. cit. p. 39.

The Catholic writers on village commons

29. Thus Molina (ii, disp. 3, §§ 7, 11, 12) draws a distinction between (1) *dominium universitatis*, which belongs to it *jure universitatis* and includes pastures and forests which are used by all and (2) *dominium particulare ... quod ... universitas sibi commutatur cuique non suus habet ac in suos pro suo privato*. He holds that the taking of wood in the common forest (*disp.* 58), and the use of the common pasture (*disp.* 59), are dependent on the regulations made by the

local community as owner, but he argues that offences by members of a local community against such regulations—unlike encroachments on the pastures or forests of other communities—should be punished only by fines, and not by the exaction of compensation (unless it be a question of really considerable damage), because the common property still remains intact [after the offence has been committed]. He refuses to admit that the lord of the manor court has any property in the commons, and allows him only a joint right of user *non solus sed pro rata* (d. 3, § 11, d. 59, §§ 3–5).

Similarly Lessius (II, c. 5, dub. 13–14) denies any obligation to pay compensation (unless 'great damage be held to have been done to the community') in cases where a community has prohibited the use of its pastures and public woods and a person has offended against such a prohibition in *loco publico communitatis ejus qua est pars*.

Lugo (I, pp. 142 sqq., disp. 6, sect. 9) takes the same view [that no compensation is due], unless there is a question of considerable damage, or of use for profit by means of sale to others, or unless the common has been let to a third party. He argues that any offence [by a member of the community against its regulations], unlike encroachments on entirely strange woods and pastures, which belong to another community or to a private person, is only an offence against *dominio*, and not an offence against *furtum*. The relation between *universitas* and *singuli* is different, however, in a monastery [from what it is in the case of a secular body]. [In the latter case], *oppidani singuli retinent suam jus partiale ad illa bona*, and they have a right of controlling their shares, because full and free property remains with the community and its members, even if the administration thereof has been transferred to some manager on its behalf. [In a monastery], although the monks in common *habent rerum bonorum dominium*, *ita tamen ibi administratio est penes communitatem vel praelatum, ut singuli neque ex parte possint conducere aliquid*.

Suarez on the various forms of community

80. Suarez distinguishes between (1) the 'natural community of mankind' and (2) the *communitas politica vel egregia*, which is 'only one in virtue of a specific act of union in a moral association'. The latter kind of community is either of divine foundation (the Church) or of human invention. The community which is of human invention is again either (1) 'a perfect community, which is capable of political government', or (2) 'an imperfect community', which does not form a *corpus* and is deficient of its *caeteris*. 'Perfect communities' include not only the State but also local communities, and not only 'real' but also 'personal' groups (such as orders and fraternities)—provided that such local communities and 'personal' groups have *perfectam regimen et mutuam unionem*, and so, while 'imperfect as parts in regard to the whole', are 'perfect as regarded in themselves'. Even so, they are 'not absolutely, but comparatively or relatively, perfect'. On the other hand the 'private household' under the paterfamilias is absolutely imperfect. cf. I, c. 6, nos. 18–20, and also supra, nos. 16 and 18.

81. According to I, c. 6, only a 'perfect community' is *persona legis capax* (nos. 1–16 and 21–22). But law need not always be imposed on the community *qua* community (*ut communitas est et corpus spirituale*). On the contrary, it generally affects the community not as being a community, but as being so many individuals (*non collective, sed distributive*, no. 17), and it may also refer to a part of the community only (nos. 23–4). Yet a law which only affects the community *qua* community—e.g. a law which commands or forbids some act which can only be done by the *corpus spirituale* itself—is still

a true law, for though such a law applies to *una moralis communitas* and thus community is called *una persona ficta* [i.e. though the law seems to be made for one 'person', which is contrary to the nature of law], yet the 'rocommunity' (or 'community' [i.e. a num of persons]), it possesses the necessary permanence, and it is directly intended to secure the common welfare of *all* its members. Moreover, the *singuli de illa communitate* are also indirectly obliged by such a law. See, in addition, 1, c. 7, and (on the other hand) the passages on the contractual character of 'statutes' cited in nn. 17, 18 and so above.

32. Cf. the *Vind.* c. *Tyr.*, where it is argued that any part of the kingdom, and therefore any province or city—but not any individual, because the individual is not a 'part'—has the right and duty of resistance when the pact with God is broken (qu. 2, pp. 94 sqq.). These parts too have severally promised for themselves [just as the whole kingdom has promised for itself] that they will be true and obedient to God in accordance with the stipulation He has made (pp. 99–100)—as is also the case, the author adds, with the Estates of the Empire in Germany, or with 'parts' of the Church, such as the *ecclesia Gallicana* [as a part of the Church Universal]. Therefore, *universa in regnoribus et urbibus* may rise in revolt, *contrarius magistratibus tamquam a Deo pressus, sine a Principe coercitus* (p. 114), and cities and provinces which do not seek to avert an attack on God's church by force of arms are guilty of a grave sin (p. 128). [As citizens in a province or city may resist, so, too, may the governors] *qui ubique parti regnorum totius sustinent, tyrannidem prorumpere ab eo regnore urbeve arcere jure sua possunt* (qu. 2, pp. 204 sqq. and 226 sqq.), and that individual nobles [as having the *status* of a 'part'] may begin a revolt, though private persons can never assert the *jus gladii* against a tyrant. The treatise *De jure regni* (qu. 6, pp. 26 sqq. and 74, qu. 7, p. 92) arrives at similar results. Danaeus (10, c. 6, p. 299) requires the consent of every province to any change of the constitution, and he adds that, when a province is not asked for its consent, 'some hold that it can choose for itself its own form of polity'—but this, he adds, is dangerous.

The Vindiciae on the rights of provinces and cities

33. Cf. for what follows, the first eight chapters of Althusius' *Politica*, and also c. 4, §§1–7, c. 18, §§90–1, c. 38, §§76 and 110–14, c. 39, §84; see also the connected account of the argument of these passages in the author's work on Althusius, pp. 21 sqq. Reference may also be made to his *Dioscologia*, 1, cc. 7–8, 23–33, 38–81.

34. Cf. vol. 1 of the author's *Genossenschaftsrecht*, pp. 544–5.

35. Althusius mentions (*Polit.* c. 4, §25)—but without attaching any great significance to it—the special category of the *corpus* (which is a broader association of a number of *collegia*), as assumed in Bodin and other writers. Like Bodin and others, he counts as 'colleges' not only (1) guilds and trade-corporations and (2) corporate Estates and ecclesiastical societies, but also (3) collegiate courts of justice, administrative Boards and ecclesiastical Boards (c. 4, §30), and (4) assemblies of representatives (c. 5, §54 and 60 sqq.), provincial diets (c. 8, §§49 and 56 sqq.), and general diets (c. 18, §62 and c. 33).

Althusius' classification of collegia as 'Fellowships'

36. In the first edition of the *Politica*, the category of 'political association' is lacking. In that edition Althusius begins his classification of associations by distinguishing the *consociatio particularis* from the *consociatio universalis* (i.e. the State); he then subdivides the *consociatio particularis* into the *consociatio naturalis privatorum* (i.e. the Family) and the *consociatio civilis specialis*, and

finally he subdivides the 'voluntary civil association' into the *consortio firmata* or *collegio* and the *consortio publica* or *societate*.

37. On the political theory of Althusius see, in the previous section, nos. 36, 52, 57, 65, 67, 70–3, 75, 77, 82–5, 87, 96, 106, 108–9.

38. See supra [vol. iv of the *Genossenschaftsrecht*, not here translated], pp. 178 sqq.

The idea of the Republica Composita.

39. This is the line followed by Cornaeus (c. 56), who contrasts the *simplices republicae* with *coniunctae confederatae*. It is most marked in Hoenonius, who places the kingdom composed of a number of cities—under the name of *republicae compositae* (d. 12)—half-way between the city-state, which he terms a *republica simplex* (d. 11), and the 'confederation' proper. He vests the several parts of this 'composite State' with a large measure of autonomy, including even the right of secession (d. 9, §§44–54), but he regards *collegia* or *societates* as merely useful divisions of the subjects of the State (d. 2, §§52–7).

Common legal writers who largely follow the federal scheme of Althusius.

40. See, for example, Matthaeus (*Coll. polit.* d. iv–v and *Syst. polit.* pp. 90–194). *Societas*, which is the primary conception, is either 'natural' or 'civil and voluntary'. 'natural society' includes the three 'domestic societies' [husband and wife, father and child, master and servant]; 'civil and voluntary society' shows itself first in its 'particular' form—in the *vicus*, *pagus*, *oppidum*, *collegium*, *corpus*, *universitas* and *curia*—and then in its 'universal' form, the *republica*.

Gioenonius treats successively of the Family (ex. 1–viii), the provincial community (ex. viii), *collegia* (ex. ix), and the *curia* (ex. x); he declares 'Fellowships' to be useful (ex. ix, q.v. 2), but regards them as permissible only *ex dictamine superioris* (ibid. qu. 5).

Koenig begins his theory of the State by enumerating Families, *collegia*, *corpora* and *universitates* among the constituent elements of the *Respublica*, and he then sketches the process of development towards increasingly broader and higher forms of society (*Arcis dept.* 1, §§123–9; *Theatrum polit.* 1, c. 1, §§376–91).

Wendenhagen starts his classification of *societas humana* (2, c. 13) from the distinction between 'particular' and 'universal' society. 'Particular' society he divides into the 'simple' society of the family-community (cc. 14–17), and 'composite society', which may be either an extended family-group (c. 18) or a 'Fellowship' (c. 19). Under the head of 'universal society', which is also termed *universitas*, he counts the *vicus*, *pagus* and *civitas*, but he thinks it a misuse of language that institutions of higher education should be designated by this term (c. 20). He expressly insists that the 'principal cause' of every *collegium* is the agreement of its members, the 'grant of a superior' being the 'less principal' (though still an indispensable) cause (c. 19, §4).

Berdringer (1, c. 17), in dealing with 'the conjunction of persons and things in the family, college, corpus and universitas', begins with the Family (§2), he then deals successively with the 'college', which is produced by the *consensus colentium et augentium* (§§3–8), the *corpus* (§9), and the *universitas* (§§10–11)—including both the *universitas personarum* (§§12–17) and the *universitas rerum* (i.e. the territory, §§18–21)], finally, he treats of the union of both of these species of *universitas* in the *Respublica*, which, he holds, may be either 'simple' or 'compound' (§§22–8).

Kirchner, in treating of *rationes*, *collegia* and *corpora* (*disp.* xiv), regards

all corporate bodies as having autonomy and judicial authority over their own members, with a certain power of coercion and punishment. In § 1, Intr. d, he speaks of a 'concession by the supreme power' as necessary, but in Intr. e he states that corporations are advantageous to the State, and only a tyrant will ever suppress them entirely—though secret and nocturnal meetings are never to be tolerated (§ 3).

41. Cf. especially Keckermann (3, c. 15, pp. 255–73), *de speciali cura subditorum collectim considerandorum*. He distinguishes *subditorum coniunctio* or *subiecti* (i.e. the Family) from *subditorum coniunctio magis ex institutione* such, though he admits that community of the latter sort is also based partly on natural law. Consequently by civil institution there may be either (1) 'more particular', e.g. *collegium, coetus, conventus, synagoga* and *sodalitas*, or (2) 'more universal', as in any sort of *collectio plurium diversi status hominum in unum corpus et locum ex quo simul habitant*. The latter species—the territorial corporation or universitas—may be either 'major' or 'minor'. The 'minor' sort is the local community, which appears as a *universitas rustica* in part of *pagus*, and as a *universitas oppidana* or *urbana* in the various sorts of towns. The 'major' sort of territorial corporation is an area composed of a number of rural and urban communities, and such an area may be either *superior* (e.g. the 'district, prefecture, barony, county') or *inferior* (e.g. the 'province, duchy, kingdom'). *Keckermann on associations*

In spite of the structure which he thus builds, Keckermann rejects the principle of liberty of associations, as being incompatible with the monarchical principle. When 'colleges have liberty of meeting', as the nobles have in Poland, it is a sure sign of the presence of aristocracy or democracy. The monarch cannot allow any association which has not received his consent, and he must punish secret unions severely, nor will he ever permit his subjects to erect a corporation *cui non praesit ut antistitis per personam aliquam a se delegatam*. He will also reserve the appointment, or at any rate the confirmation, of the officers of 'colleges', since the 'constitution and authority of the whole college' resides in these officers, and therefore the person appointing or confirming them 'has also control over the constitution and authority of the whole college'. Even in republics, he argues, this [right of appointing or confirming the officers of 'colleges'] is advisable (pp. 261–2). He treats the local community in the same way as the 'college', vesting the sovereign with the ordering of its constitution, the appointment of its officers, and a perpetual judiciary supervision (pp. 265 sqq.).

Schoenborner adopts a similar view. He treats of the Family (1, c. 10), *collegia et corpora* (c. 11), *universitates* (c. 12) and the *civitas* (c. 13), but like Keckermann he allows the erection of corporations only 'by the authority of the sovereign', and he gives the same advice to the sovereign, word for word, in regard to [the appointment or confirmation of] officers. The same line is taken in the treatise *De iure publico seu civili libri tres*, 1, disc. 35–42.

42. Keckermann (loc. cit.) adopts as his basis the conception of *consortium*. Matthias (loc. cit.) uses the idea of the *communitas* produced by *societas*. Schoenborner adopts Althusius' theory of *consensus* and the *communitas rerum, operarum, juris et beneficiorum* which it produces (1, c. 11), but he regards this *consensus* and *communitas* as creating a *corpus mysticum* which is like the natural body—*unius enim homines sunt, quique personam representant*—and he avails himself of this point of view to reproduce in extenso the whole of the Roman-law theory of corporations (1, c. 19). *Prevalence of idea of Partnership*

Berckringer takes the same line as Schoenborner. He uses the idea of a

'union of minds, services, persons, things and laws' (5, c. 17, §7), the fiction of the single personality, combined with the idea of the material identity of the universitas with its individual members (§10), the traditional theory of the *negotia publica* and the delicts of corporations (§§12–15), and the customary distinction of the various species of public and common property (c. 16, §§15–39).

Grotius on universitates

43. Afterwards, in his theory of contracts (II, c. 11), he treats of *societas negotiorum* (§24) and *societas omnis* (§25), and devotes a whole chapter to *foedera* (c. 15).

44. Cf. 1, c. 1, §3: a 'society without inequality' exists as between *frater, mas, civis, foederatus*: an 'unequal society' as between *pater et filius, dominus et servus, vir et uxor, Deus et homines*. In the same way there are also two sorts of *justum*—*aequatorium* and *rectorium*.

45. II, c. 6, §§4–8, III, c. 20, §5: cf. the passages in nn. 37 and 132 to §14.

46. Cf. *supra*, nn. 57 and 66 to §14.

47. Cf. *supra*, n. 51 to §14 and pp. 51–2499, with nn. 97, 98, 99.

Grotius on the majority-principle

48. Cf. the decisive statement in II, c. 5, §17, quoted in n. 74 to §14. Grotius proceeds to discuss in detail a number of questions: the possibility of an equality of votes, in which case no decision can be arrived [in matters of policy], but in criminal proceedings acquittal must follow (§19), the methods prescribed by Natural Law for arriving at a decision when there are more than two *sententiae* (§19), the rule of Natural Law by which *pars maioris omnium interim praevalentia*, while positive law often requires the presence of two-thirds (§20), the 'natural order' among the *iura*, according to the ages of the members (§21), and the counting of a majority by the shares [belonging to the *sociétaires*] where a *res* (e.g. an inheritance of an estate) is the basis of the *societas* (§22).

Grotius on corporate liability for debt

49. III, c. 2, §1: It is true that the members are responsible for the sum involved in proportion to their shares, but they are responsible *non quia singuli, sed quia pars universitatis*. As against this rule of Natural Law, the *jus gentium voluntarium* may introduce, and appears to have actually introduced, the rule that *pro re, quod debet praestare nullus alienus mortus est quasi caput*, 'there is a lien and obligation' (sometimes primary and sometimes secondary) 'on all the goods, corporeal and incorporeal, of the persons who are included in such a society or are subject to its head' (ibid. §2). There is a need for such a rule, since it is difficult to get at the *singuli*, nor does it contradict Natural Law to such an extent as to be inadmissible.

Grotius on the delicts of corporate bodies

50. Cf. II, c. 21, §§2–7. A community is responsible, properly speaking, only for its own delicts, and thus it cannot be responsible for a *factum singulorum*, except as the result of its own *patientia* or *receptio* (i.e. harbouring the person or persons concerned). Conversely, *singuli* are responsible for the offences of the *universitas*, and *subditi* for the delicts of the *summa potestas*, only in cases where they have incurred a joint responsibility by giving assent thereto or by executing an unlawful command. The results [of a corporate delict] descend, it is true, from *universitas* to *singuli*, because *sit universitas, sit et singuli*: *universitas non possunt esse singuli quemadmodum contra, nec singuli quoque congregati, sit in numerum redacti, facient universitas*. But the innocent minority must be treated gently in the matter of punishment, because, in spite of what has just been said, *distinctio inter partem singularem et universitatis*. There is a distinction, for instance, between the death-penalty, as applied to individuals, and *mors civitatis, non corpus civile disciplinae*: similarly the confisca-

ment of individuals differs from the separate merits of the secretaries or its transformation into a mere province. Similarly, again, the confiscation of corporate property is something different from the confiscation of private property. It is thus unjust that innocent individuals should lose their property through the delict of a secretary (*cf.* also §§ 11, 17, 18). On the other hand, a 'consequential loss' may affect innocent individuals, just as children suffer from a confiscation of property pronounced against their parent, so individuals suffer from the punishments inflicted on corporations—*sed ea in re, quae ad ipsos non pertinet non per consequens.*

51. See the preceding note, and also nn. 67, 70, 89, 90, 121 and 127 to § 14.

52. In treating of the question raised in n. 21, § 8—whether 'a penalty can be exacted in every case for the delict of a secretary'—Grotius argues that an affirmative answer appears to be inevitable, because *quando secretarius deest, idem corpus est.* The true answer, however, is in the negative. A distinction has to be drawn between attributes which are predicated *de secretario primo et per se*, e.g. the possession of an *aerarium* or *of fiscus*, and those which only belong to it *de derivatione et negative*, e.g. the attributes of learning, courage, or merit; for such attributes primarily appertain to individuals, *et secundo habentur, quam secretarius per se non habet.* In the latter case, therefore, the merit disappears *etiamsi illis per quos id secretarium meritum deberetur*, and what is true of merit is also true of [the opposite of merit, i.e.] a delict which involves a penalty. The position is different, however, in regard to divine punishment, which often comes upon a later generation only. *Grotius tends to resolve corporations into individuals.*

53. Hobbes' theory of association, which is only indicated in the treatise *De cive*, is developed in the *Leviathan*, where the whole of c. 22 is devoted to it.

54. Cf. *Leviathan*, c. 22 and *De cive*, cc. 10–13. Hobbes compares corporations to the muscles of the human body, and alleges in its support [Hobbes remarks that in any event 'the great number of corporations' is 'like worms in the entrails of a natural man'.] *Hobbes on corporations.*

55. Hobbes, in c. 22 of the *Leviathan*, also applies this idea to parliaments, which he regards as 'regular subordinate systems', with a personality of their own, which have been instituted for a limited time. They can only discuss proposals put before them by the Ruler, and they have no authority other than given by the terms of their summons; otherwise there would be two powers in the State. *Hobbes on Parliaments.*

56. This is the argument of the *Leviathan*, c. 22, but it already appears in the *De cive*, c. 5, § 10. In such a case [i.e. the case of a claim by a subordinate system against its members] the members may also occasionally protest with success against majority-decisions, but this is inadmissible in a sovereign assembly, where such a protest would bring in question the *supreme potestas* itself, and where, apart from that, *quoties fit a nemine potestate exercitio fit curiae singulis et omnibus.*

57. In provinces and colonies be thanks a monarchical constitution prevailing, as even democracies generally recognise. Trading companies, on the other hand, are best managed by a *senatus*, with a right of voting for all who contribute money. *Leviathan*, c. 22. *Hobbes on colonies and companies.*

58. He states a different point of view in the *De cive*, c. 7, § 14. Dealing with the question whether the 'person' of the State can itself commit sin, he concludes that in a monarchy the Ruler himself commits a sin if he offends against Natural Law, quia in ipso solutor ratio *subiectum* et *ratio naturali*, whereas *Hobbes on sin and delicts of groups.*

in a democracy or aristocracy the sin is not that of the *persona civilis*, but of *eius illi quorum suffragiis decretum est—peccatum enim consistit voluntatem scilicet et cognitionem, non politicam, esse vel artificiosa*

No question of a *delictum* [i e a legal offence, as distinct from sin or *peccatum*] can ever arise in this connection [i e in regard to the State], as it does in regard to *Systemata subordinata* The point is simply that *peccatum*, i e sin as distinct from delict, cannot be attributed to a *persona civilis* [as such, and apart from the 'natural will' of its bearer]

Hobbes on the debts of groups

59. Hobbes would regulate responsibility for debts in *Systemata mercatorum* in a somewhat different way In such 'systems' there should be an obligation 'of each member severally to pay the whole of the debt' to a third party, because that party knows nothing of an 'artificial person', *sed personae naturalis omnes omnes obligari solent rebipsum* On the other hand a creditor who is also a 'member of the System'—being, in that capacity, a debtor himself [and so unable to take action against individuals which would also be action against himself]—can only take action against the system and its common funds [In this latter case, therefore, the general rule enunciated in the text, that the system alone is liable, applies also to *systemata mercatorum*] If the State, by virtue of its supreme power, demands money from such a system, the members must furnish the sum demanded by making proportionate contributions [i e contributions proportionate to their shares]

The Empire a mere name

60 Cf e g Hermann's *Diss de pace perpetua*, 1, p 6, § 10, Michael, 1, p. 168, §§ 9 sqq , Cluten, 11, p 10, § 3 and pp 35 sqq , §§ 9–13, Engelbrecht, 11, p 187, §§ 97 sqq , Sinolt Schutz, 1, ex 1, th 16–19 A different view appears in Wurmser, *Exerc* iii, qu 2 and 21 (the Empire is now only a name) cf also Limnaeus, vii, c 1, no 32 (Roman Empire and German monarchy have gradually merged to such an extent *quod nunc, non ille qui olim eiusdem regni, dominus potest esse*)

Suarez (iii, c 7, nos 1–13 and c 8) expressly denies the emperor's *imperium mundi* even the Pope, according to iii, c 6, has no such *imperium*, because, apart from the States of the Church, he has no 'direct temporal power' Cf also Vasquez, cc 8, 20, 21

The idea of a societas gentium

61 Cimarosti (1, c 5, nos 1 and 4, and c 6, nos 2–3) holds that *jus gentium* is the product of a *societas humana*, in which the original unity of mankind has continued to be preserved even after its division into 'civil societies', and in which a relic of the old community of all men thus persists For similar expositions cf Omphalius, 1, c 38 and Winkler, 1, c 9

Gregorius Thol (1, c 3, §§ 1 sqq) regards *communitas gentium* as the survival of a *civitas mundana*, with God for its king and all men for its citizens, which in all other respects has split into *civitates et civitates particulares*

Gryphiander, in §§ 1 sqq of his *De civili societate* (printed in Arumaeus, 1, no 6), speaks of a *universalis societas humana, cuius conditor est jus naturale* Cf Johannes a Felde, 1, c 1, § 5

Suarez (iii, c 2, no 3, c 4, no 7, c 19, no 9) argues that in secular matters *aliqua civilis* still survives from the [original] unity of mankind, so that men continue to constitute a *societas et commonwealth*, and although *unaquaque civitas perfecta, respublica, aut regnum, sit in se communitas perfecta et sui membris constans, nihilominus plurimae aliarum ut eiusdem membrum aliquo modo huic universae* this is the basis of international law

Grotius speaks of [States as] *membra unius corporis* (ii, c 8, § 26, c 15, §§ 5 and 12), of a *societas humana* (ibid c 20, of c 21, § 4), and of *jus gentium*

as securing property even to children and lunatics, *personam illorum interim quasi sustinente genus humanum* (ibid c 3, §6)

62. Albericus Gentilis (in his *De jure belli* of 1588, pp 11–13) refers the obligation of *jus gentium* to the fact that, although all peoples have never assembled [to enact it], *quod tacentibus omnibus placeret omnes est, et tutior orbis determinatio futura videretur* He adds *nam, ut recte contra et legislatio vel jurisdictio majorum partium, sic orbis certe est posse congregabantur majoris partis orbis*. *Idea of a world Commonwealth*

In the same way Victoria speaks of a human commonwealth, including all States as its members, in which majority-decisions are valid (*Rel* III, nos 12 and 15)

The *Vind c Tyr* makes the unity of *humana societas* the source of a right and duty of neighbouring States to intervene for the protection of oppressed subjects against a tyrant (qu IV, pp 348–58)—just as (ibid pp 329–48) it makes the conception of a single Church the justification of intervention against religious oppression

Bonham (I, c 2, §§3–8) regards *jus gentium* as the outcome of the universale *Respublica omnium hominum*

63 The idea [of a natural community connecting States] is absent in Bodin and his school In the view of Hobbes, as we should expect, the natural condition of States, like the primitive state of nature among individuals, is a condition of *bellum omnium contra omnes*, and a real international law is therefore absolutely impossible *No international law in Hobbes*

64 Suarez (loc cit) lays emphasis on the idea that it is only particular nations which are States with legislative power There cannot, therefore, be any *lege ratio universalis*, common adhesion to international law constitutes only a *societas quasi politica et moralis*, and it is only 'in a sense' (*aliquo modo*) that States are members of a larger whole Cornanus also (loc cit) terms the universal society only *quasi omnium urbs et civitas*, and international law only *quasi jus civile* *Suarez on international society*

65 Cf Bodin (II, c 6, no 224 and c 7), Althusius (*Polit* c 17, §§25–53), Cassiarius (c 66), Hocsanus (dd 18 and 19), Grotius (*Apologeticus*, Paris, 1622, c 1). See also Brie, *Der Bundesstaat*, I, pp 14 sqq and G J Ebers' recent work on *Die Lehre vom Staatenbunde*, Breslau, 1910, pp 108 sqq *Federal ideas*

66 See above [vol IV of the *Genossenschaftsrecht*, not here translated], p 274, no 74 See also Wordenhagen (III, c 25, §16), on a federation as a *corpus foederatorum*, but not a *respublica*, Althusius (c 33, §§122–36), on *societas societatum confederatarum*, and Arnisaeus (*De rep* II, c 4, n 8, §§24–29), on *confederationes civitatum* which have the appearance of a *Respublica*

67 In I, c 3, §7 Grotius deals both with 'unions' (which he knows only in the form of personal unions), and with 'confederations' (*Staatenbunde*) In II, cc 15–16, on the other hand, he deals only with *foedera* or treaties, which he divides into 'equal' and 'unequal', and he remarks in an earlier passage (I, c 3, §21) that even an 'unequal treaty' does not extinguish sovereignty. Grotius was the first thinker to draw the contrast between unions and federations cf Jaroschek, *Personal and Real Union*, p 2, and Ebers, op cit pp 17 sqq *Grotius on unions and federations*

68 See Victoria, *Rel* I, qu 3, no 8 and III, Vasquez, *Controv* 8, 19, 21, 27, Soto, IV, qu 4, a 1–2, II, qu 3, a 1, Molina, II, d 21, Lessius, II, c 5 and III–IV, Suarez, I, c 7, no 5, c 8, no 9, III, c 3, no 8, cc 6–8, Contacci, II, c 18 and VI, Claudius de Carrin, I, cc 13 and 15, Menochius, *Hism-* *Catholic theory of the Church as superior*

politica, I, c. 1 and II, cc. 1 sqq. Among the Monarchomachi, see Boucher, I, cc. 5–8 and 18, and II, Rousseau, cc. 3–11, Mariana, I, cc. 8 and 10.

See also Pighius († 1542), *Hierarchiae ecclesiasticae assertio*, Cologne, 1551 (first printed 1538), Sanderus, *De visibili monarchia Ecclesiae, libri VIII*, Louvain, 1571, Schultingh, *Hierarchiae assertio*, Cologne, 1604.

Theory of its potestas indirecta

68. See Bellarmine, *De membris ecclesiae militantis*, III, 6, *De Summo Pontifice* lib. V, and *De potestate summi Pontificis in rebus temporalibus adv. Barclaium*, Rome, 1610, Molina, II, d. 29, Suarez, III, c. 6, Barbosa on c. 6, X, I, 33 [of the canon law], Gonzalez Tellez on c. 6, X, I, 6, no. 34 and c. 6, X, I, 33, nos. 14–19. A similar view is already to be forged in Soto, IV, qu. 1, a. 1. Of course the theory which ascribed to the Pope a direct power over emperor and kings did not disappear: cf. e.g. Restaurus Caldus in *Tract. Universus Jurs.*, XVI, no. 30, qu. 50, Marta, *Tract. de jurisdictione*, Mainz, 1609 (cap. I, cc. 3, 8, 17–26 and IV); Laymann on c. 34, X, I, 6 and c. 6, X, I, 33.

Theory of its parity with the State

70. Cf. Gregorius Thol. VII, c. 2, Tulden, *De regimine civili*, I, cc. 17–18, P. de Marca, *De concordia sacerdotii et imperii seu de libertatibus ecclesiae Gallicanae*, ed. John VIII, ed. J. H. Boehmer, Leipzig and Frankfort, 1708 (books I–IV first printed at Paris in 1641, and the whole work in Baluze's edition of 1663), esp. II, c. 1, where it is argued that while there are *potestates distinctae*, there is a *nexus* between the two.* See also *supra* [vol. III of the *Genossenschaftsrecht*], pp. 813 sqq.

71. See *supra*, vol. III, pp. 799 sqq.

The Lutheran theory

72. A complete formulation of this expression is to be found in B. Carpzov, *Jurisprudentia ecclesiastica seu consistorialis*. In I, tit. 1, def. 9, he describes the 'double person' of the territorial prince, who exercises 'double power, ecclesiastical as well as political'; in I, tit. 1, deff. 11–12, he treats of the consistories as his organs; in I, tit. 3, def. 27, he explains the ordered co-operation of the 'whole church' in the three Estates; see also *Decr.* 115. But a full elaboration of the theory of the episcopal system may already be found in M. Stephani, *De potestatibus*, III, p. 1, cc. 1 and 15. In addition see Chiphalius, I, c. 3 (there is a 'double polity', but the ecclesiastical commission of the territorial prince comes from God), E. Cothmann on *Col.* I, 1, qu. IV and *Col.* I, 2, Arnisaeus, *De jure maj.* II, c. 6, *De injectione et compositione clerorum*, etc. (published at Strasburg in 1635, but written in 1610), B. Meisner, *De legibus*, IV, a. 2, Wurmser, *Exer.* V, qu. 1–24, Clauen, in Buermann, II, pp. 1 sqq., §§ 5–8, Lampadius, p. 1, §§ 16–29, Schute, II, exerc. 14, pp. 911–1000, Kurpschildt, II, c. 3 and V, c. 8.

Zepper and others on the Calvinist polity

73. This view is worked out completely in e.g. Zepper, *De politia Ecclesiastica*, Herborn, 1595. He treats in Book I of the subject-matter of ecclesiastical administration, in Book II of ecclesiastical office, in Book III of church government. Church government is conducted by *consistoria* in the four stages (cc. 1–7) of 'presbyteries', *consistoria classica* [or 'classes'], provincial synods and general synods (subject to the general principle that *quae in inferioribus consistoriis aut gradibus decisa possunt, ad superiores devolvi non debent*), and also by *visitatores* (cc. 8–17). But the secular authority has a power of co-operation, since magistrates and ministers are two institutions of one and the same community, ordained for the Church by God (c. 12). Compare also the doctrine of the *Visit. v. Tyr.* (qu. II, pp. 74 sqq.) on the joint contract

* Cf., for this theory of 'alliance', the work of Warburton, Bishop of Gloucester, on *The Alliance between Church and State*, published in 1736. It was a work which had some vogue in England during the eighteenth century.

of people and king with God, the treatise *De jure magi* (qu. 10), Hotoman, *Franogallia* (c. 20), and especially Althusius (c. 8, §§6–39, c. 9, §§1–29 and c. 28). Cf. also David Blondel, *De jure plebis in regimine ecclesiastico*, Paris, 1648, on the inalienable rights of the congregation, which are never transferred to the government.

None of this applies, of course, to the body of opinion which is based on the teaching of Zwingli. Zwingli rejected entirely the conception of a 'spiritual State' and a 'spiritual authority', and ascribed all power of ecclesiastical government, as being 'external' in its nature, to the Christian State: see his *Works*, 1, pp. 197 and 246.

74. Cf. Stephen of Winchester, *Oratio de vera obedientia* (1556), in Goldast [*Monarchia Sancti Romani Imperii*], 4, pp. 716–33, where it is contended that *Reges, Principes et Magistratus Christiani antiquitus non Ecclesiae supremum in terris caput sunt, et religionem cum primis procurare debent*. Cf. also Johannes Beckmann, *De regimine et abrogatione Regis Imperii liber unus*, with a dedication to Henry VIII, in Goldast, 1, pp. 733–55; Wartmund de Rotenberg, *De regno naturali* (cc. 1–2, pp. 12–43), who argues for a *jus majestatis, supremitatis, superioritatis absolutae potestatis circa res ecclesiasticas*; Alexander Irvine (Scotus), *De jure regni diversorum*, Leyden, 1627, Keckermann, *Polit.* 1, c. 92, who holds that *principi habet jus majestatis ecclesiasticum, absque potestatis ordinandi ea quae ad cultum Dei et curam religionis tantummodo pertinent*, p. 316; Frideureich, *Polit.* c. 12; Hoenonius, *Polit.* 1, §48, v. §§3–55; Kirchner, *Disp.* vi; Grauwinkel, *De jure sacro*, c. 5.

The territorial theory

See also Carolus Molinaeus, *Comm. ad Codicem*, on *Cauti. Feud. Imp.* 'Cuncta et omnia', pp. 29–30, and Besold, *Diss. de sacro*, sect. 9.

75. See above [vol. iv of the *Grundmachtlehre*, not here translated], p. 80, n. 63, and cf. Besold, *Diss. de sacro*, sect. 2, *Diss. de jure coll.* c. 2, §§5–6, *Diss. de jure et dominio sacrorum*, c. 5.

76. See, on the one side, Hobbes, *De cive*, c. 17 and *Leviathan*, c. 39, and on the other, Milton, *Prose Works*, II, pp. 320 sqq.

Uniformity & toleration

Bermann (*Diss. de jure pacis*, 1, no. 16, §§21 sqq.) also combines the demand for freedom of conscience (§§26–8) with a general point of view which is 'territorial'.

77. Fourth edition, the Hague, 1661. First printed at Paris, 1648.

78. In this justification of the majority-principle (c. 4, §6) Grotius, it is curious to notice, deserts the individualistic point of view on which he strictly insists, in this very connection, in all the rest of his writings (cf. supra, n. 48).

Grotius' De Imperio

79. See c. 4, §§9–19. The *regimen constitutum ex consensu*, which issues in e.g. the institution of the Sabbath and the appointment of deacons, belongs to the Church by Natural Law, *data enim societate, hoc ipsum jus ex natura societatis contactae nascitur*. Positive law may deprive the Church of particular rights, but it may also confer upon it an *imperium summum* or *inferius*.

80. Positive law may confer upon persons an *imperium inferius*. But in that case such *imperium* is not the expression of the *vera jurisdictio* they exercise—a function which is subject to the State only in the ordinary way. It is the outcome, and the expression, of political authority, and therefore genuine, in so far as they exercise such an *imperium*, *supremum potestatem recipit et delegat sibi*. Cf. c. 2 and c. 4, §§7–8, 11–12 and 14.

81. Cf. c. 1. Grotius proceeds to deal in detail with the action of sovereignty upon the different areas of ecclesiastical life, maintaining throughout

Grotius on the rights of the Sovereign over the Church

the principle that the indestructible rights of the sovereign continue still to exist, by virtue of Natural Law, even where certain rights are delegated, by virtue of positive law, to other ecclesiastical or secular 'Subjects'. It depends on the will of the sovereign whether he admits co-operation of the clergy (c. 6) or the participation of synods (c. 7, §§ 1–8) in the exercise of ecclesiastical authority, which includes the power of deciding on doctrine (c. 5). He can appoint the members of synods, or he can allow them to be elected with a reservation in favour of his own *jus impera et disponere*, he has the power of summoning, adjourning and proroguing synods, and he possesses the right of confirming, changing or altering all the acts of synods (c. 7, §§ 9–17). Ecclesiastical legislation belongs to him, including the allowance and disallowance of confessions, and the ordering of all things which concern 'the public increase of true religion'; the Church has no right of legislation at all in virtue of the law of God, and so far as it possesses such a right in virtue of positive law, it possesses it, at the most, only *cumulative et dependenter* (c. 8). The sovereign alone has *exclusivum jurisdictionis*, all jurisdiction of the clergy, so far as it is not really simple *nunc et directe*, is based on delegation by the State, and is subject to *appellatio ab abusu* (c. 9). The sovereign has the confirming and dismissing of the holders of the necessary ecclesiastical offices (*presbyterium* and *episcopatus*), and while the original appointment of such persons belongs *mediate* (though at the same time *mediatiste*) to the Church, the sovereign not only controls all appointments, but may also make them himself (c. 10). He can also institute ecclesiastical offices which are not 'necessary' (the offices of bishop and elder, c. 11); he retains supreme authority over all boards or corporations or persons in possession of ecclesiastical powers, since any inferior *potestas* exercising a *jus circa sacra* necessarily derives such right from him, moreover, the authority exercised by such inferior powers must be circumscribed, on grounds of expediency, within the narrowest possible limits (c. 12).

The only limit to *jus imperii circa sacra* admitted by Grotius, other than the impossibility of controlling *actus mentis*, is the *jus dicendi*, but even commands of the sovereign which are contrary to the word of God oblige the members of the State—not indeed to obey, but at any rate to abstain from active opposition (c. 9).

Antonio de Dominis

87. Views similar to those of Grotius are to be found in Marcus Antonius de Dominis, an archbishop of Spalato who went over to the Church of England (1560–1624): see his *De republica ecclesiastica libri X* (of which Part I appeared in London in 1618, Part II in London in 1620, and Part III in Hanover in 1622), more especially Book V, which assigns to the Church only a *potestas ejurisdictionis*, and no *vera praefectura et jurisdictio*, cf. also Book VI, cc. 3–7.

Conring on Church and State

88. For Conring's views see the Corollaries to his treatise *De constitutione ejusque partibus Germanicis* (Exerc. VII in *Exerc. de rep. Germ. Imp.*), of May 16, 1647. According to the Third Corollary, *Ecclesia in hoc terra non est aliqua respublica, sed naturam potius habet collegii in republica constituti*. According to the Fourth, however, the 'authority and magnit' of the *Respublica* are not needed *eius ex parte* for an 'ecclesiastical society', as they are for the institution of other 'colleges', and according to the Fifth, the 'universal church', in virtue of natural law and the law of God, is 'one body' in exactly the same sense as the whole of mankind or universitas *hominum hominum*.

84. *Politica ecclesiastica* (Amsterdam, 1669 sqq.), vols. I–IV.

The collegial theory of Voetius

85 Ibid. Part 1, Bk. 1, tract. 1, c. 1 As distinct from the 'mystic and invisible Church', the 'external Church' is a 'visible collection', whose 'immediate foundation' is consensus sectus *et arbitrium electi declaratum* seorum per cohaerentiam ecclesiae, though 'divine institution' is its 'ultimate foundation' (§4) The erection of the ministry also depends on consent

86. Ibid §8 With strict logic, he rejects the theory of canon law in regard to the distinction of *ecclesia regularis* and *ecclesia collegiata* all churches are 'collegiate', and none of them has any advantage over any other (ibid 1, 1, tr 1, c. 6) He also pronounces against all separate ecclesiastical fellowships and fraternities (n, iv, tr 4)

87 1, 1, tr 2, cc 4–6. He describes the *populus sive corpus ecclesiasticum* as the 'Subject' or owner of ecclesiastical authority—not the 'people alone', nor the clergy alone, but the whole organized ecclesiastical people including its pastors

Four possible relations of Church and State

88 In 1, 1, tr 1, c 1, §8 Voetius distinguishes four possibilities (1) identity of the political with the ecclesiastical corpus, as in Israel, England, Switzerland and Geneva, (2) the recognition of the true religion as the only public religion, with toleration of different creeds and confessions, as in the Netherlands, (3) a heterodox political community, with toleration of the true Church, as in France, (4) a political community hostile to the true Church, as in most countries

89 1, 1, tr 2, cc 4–5

90 1, 1, tr 2, cc 2, 5, 7–15, 17, 20, tr 1, cc 5–5 He speaks accordingly of a separate *politia ecclesiastica*, distincta a *politia politica et oeconomica*, 1, 1, tr 2, c 7, §5

91 1, iv, tr 2, c 1, §§1–2 Property belongs to the 'visible church', because the 'mystical church' is not capable of holding property It does not belong to *presbyteri*, nor again to *collegia* *cleri* or the *ministri publicos* We may describe what belongs to the Church as *bona Dei* or *patrimonium Christi*, because Christ is the Head of the 'mystical body' of which all believers are members

92 Cf. Ludicomatus Columna, *Papa Ultrapetitor, sive Mysterium impietatis revelatum a clerisque sive Clericis Verus, in opere Pelagiae ecclesiasticae*, London, 1658 This work seeks to prove that the theory of Voetius, if it shows more piety, also betrays more absurdity, than that of the papalists Any theory which assumes two separate powers is unchristian *

* The real author of this work was L. du Moulin (1568–1658), who after studying medicine at Leyden and Cambridge was Professor of Ancient History at Oxford from 1648 to 1652, and afterwards lived at Westminster He also wrote a work, in English, on *The Rights of Churches*

§16. THE GENERAL THEORY OF THE GROUP (*VERBANDSTHEORIE*) IN NATURAL LAW

States as moral persons in a state of nature

1 See Spinoza, *Tract pol* c. 3, §§11–18; Pufendorf, *Elem* §§24–6, *De jure nat et gent* II, c 3, §23, Thomasius, *Fund jur div* I, c 1, §§101 sqq., Gundling, *Jus nat* and *Dissc* c 1, §54, Heineccius, *Comm* II, 3, pp 212 sqq, Beccaria, *Mel* c 1, J H Boehmer, *P. jus* c 2, §§39 sqq, *P spec* I, c 3, §28 n 6 (who speaks of 'a state of nature or liberty', involving a *status pure naturae*, as — sq free and equal 'moral persons'), Wolff, *Instit* §§1088 sqq, *Jus* — Heineccius, *Elem* I, c 1, §§21–2, II, c 1, §§1 and 27, Daries, *P spec* §§790 sqq, Nettelbladt, *Syst nat* §§1405 sqq (*quadlibet gens, quae inter consistunt, ut personae morales in statu naturali mutuo, et plures gentes sunt plures universali personae*), Achenwall, II, §§210–88 (*jus naturale* exists among 'external societies', i e among *gentes* regarded as 'free moral persons'), Justi, *Natur und Wesen*, §§122–3, Locke, II, c 12, §§145–6 [cf the *Second Treatise on Government*]

2 See the author's work on Althusius, pp 287 sqq and 300 sqq

3 On this point Spinoza (*Tract theol pol* c 16 and *Tract pol* c 2) agrees entirely with Hobbes

4 This is the view not only of Hobbes (see supra, p 83 and no 63 to §15), but also of Spinoza (*Tract theol pol* cc 16, 17, 20 and *Tract pol* cc 3, 4, 5)

5 This is the reason why the German writers on natural law, though following Hobbes closely in other respects, from the time of Pufendorf onwards, always attack his conception of the state of nature Gundling comes nearest to Hobbes' conception (*Jus nat*, c. 3 and *Exerc* 4, pp 153 sqq.), but he arrives at totally different results

Thomasius on the nature of Law

6 At first Thomasius regarded all law as the 'will' of a 'ruler'—creating *lex positiva* as the command of men, and *lex naturalis* as that of God, cf. *Instit jur div* I, c 1, §§28 sqq and *Annot ad Strauch dict* 1, pp 2 sqq In his later days he continued to believe in the imperative character of positive law, but instead of describing *lex naturalis* as a divine command with 'external obligation', he now defined it as merely a *continens praecepta internae obligationis*, or a *dictamen rationis*, of which God was the ultimate author but not the legislator cf *Fund jur nat* I, c 3, §§28–31. [This later view involves him in some difficulties] Making a general division of the norms which limit the action of human will into the ethical, the political and the legal (*ibid.* cc 1–4), he proceeds to apply this triple division not only to positive rules, but also to the rules of nature (*c* 5, §§5 sqq.); but he fails to make any real distinction between 'Natural Law' proper and 'natural ethics' or 'natural politics', because he cannot prove that Natural Law [regarded as a 'counsel' or 'dictate of reason'] possesses that attribute of being enforceable which he regards (c. 7) as essential [to law proper]. [We may compare with his change of front in regard to Natural Law a similar change in regard to customary law] At first he regarded customary law as only existing in consequence of the sanction of a sovereign (*Inst jur div* I, c 2, §109) afterwards, he allowed that it possessed the character of law even if it had no such sanction (e g in the case of customary law *inter gentes*), but he qualified this admission by adding that such customary law was a law without obligation, cf. *Fund.* I, c 5,

§ 78, *Addit. ad Hubert. Prodect. Just.* 1, 9, nos. 7 and 10, and *Dur. de jure convent. et obsequiis.*

7. This fact of external obligation is expressly emphasized by Gundling, c. 1, §§ 47–50 (*obligatio extrinsecus et externa*), Becker, §§ 2, 5, Muddener, 1, § 1 (*constricens obligatio*), J. H. Boehmer, 1, *P. gen.* c. 1, Achenwall, *Prol.* §§ 98 sqq., 1, § 44.

8. This is the composite view which appears in Pufendorf, of *De off. hom. et cit.* 1, c. 2 taken along with c. 3, and *J. n. et g.* 2, c. 3 taken along with 1, c. 6 (God may be regarded as 'Sovereign', and *lex naturalis* as His *volunter*, but apart from *lex divina positiva* there is also a *lex divina per ipsam rerum naturam hominibus promulgata*). It was the original view of Thomasius (*supra*, n. 6), it appears in Alberti, c. 1, Cumberland, c. 3, Becker, §§ 2–6, Muddener, *Prol.* 1, § 1 (*jus naturae est dictatum rationis divinae per rationem promulgatum*), H. de Cocceji, *Prodromus*, 3, de Cocceji, *De princ. jur. nat. univ.*, *Tract. jur. pub.* Parts 1 and 2, *Novum systema*, 1, §§ 56–60 ("a command of nature and its author, declared to mankind by reason"), Kemmer, c. 1, J. H. Boehmer, *P. gen.* c. 1 (a 'norm' which proceeds from the 'will' of God, but 'is written in the hearts of men'), Schmier, 1, c. 1, n. 1, § 3, Heineccius, 1, c. 1, c. 3, Achenwall, *Prol.* and 1, §§ 7 sqq. (a true law of God, in the juristic sense). *Natural Law and human Reason*

9. This is a view which appears in Horn, *novitter dictum*, and not *solenter dictum*, is the source of natural law, and human reason (as a relic of man's being originally in the image of God) is the means of knowing what it is (2, c. 2). The same view appears in Huber, he holds that there can be law even without a *Superior* or force (1, 1, c. 1, §§ 2–5), and he regards natural law as a command of reason implanted in man by nature, and by God as the author of nature (*ibid.* c. 2). A similar view is also to be found in Gundling (c. 1, §§ 4–11), and in Leibnitz, who derives natural law from the nature of God, and regards constitution and enforcement as inessential (*Op.* iv, 3, pp. 270 sqq., 275 sqq., 294 sqq.). Cf. also Wolff, *Instit.* §§ 39, 41, 67, and Montesquieu, *Esprit des Lois*, 1, cc. 1–2 (*raison primitive . . . les lois de la nature dérivent uniquement de la constitution de notre être*). *Natural Law rationalized*

10. Cf. e.g. Gundling, c. 1, §§ 47–50, S. de Cocceji, 1, § 56 (*vique sacra potestas*), Achenwall, 1, § 44 (*sub commendatione potestas*).

11. When, as in Grotius (*Proleg.* no. 11 and 1, c. 1, § 10) and his precursors (on whom see the author's work on Althusius, p. 74), the assumption was made that there would be a Natural Law even if God did not exist, or if He were unjust, the logical consequence of that assumption was the abandoning of any idea that it was derived from the will or the nature of God, and this is what we find in Thomasius, *Fund.* 1, c. 6 [cf. *supra*, n. 6]. After Locke in England, and Rousseau and his successors in France, had contented themselves with merely invoking 'the order of nature', the connection of Natural Law with the idea of God tended also to disappear among German thinkers, it is not present, e.g. in Justi, Schmalenstiel, Schlözer, Hoffbauer or Fichte. Kant definitely holds that the notion that God is the author of the moral law is untenable, for God is Himself under that law, and He is obliged to act by its rules (*Works*, vii, pp. 8 sqq.). *Natural Law secularized*

12. Cf. Leibnitz, *Nova methodus*, § 74, and introduction to the *Cod. jur. gent.* 1, § 11, J. H. Boehmer, *P. gen.* c. 1, Schmier, *Jur. publ. univ.* 1, c. 1, n. 2, §§ 1–3, Achenwall, *Proleg.* §§ 98 sqq., 1, §§ 34 sqq., Fichte, *Works*, iii, pp. 145 sqq.

Right under Natural Law

13 In regard to international law, there was unanimity on this point. So far as the public law of the State was concerned, all the theorists who recognised a right of resistance to any breach of Natural Law by the sovereign sought to justify their view by assuming a return to the state of nature, and therefore to the right of self-help belonging to that state. Cf. the author's work on Althusius, pp. 314–5, and esp. Wolff, *Polit.* §§433 sqq., *Jus nat.* viii, §§1041 sqq., *Instit.* §§1079 sqq., Darjes, §§710 sqq., Achenwall, i, §9, ii, §§200 sqq., Schmelzing, iii, pp. 364 sqq., and also Rousseau, iii, c. 10.

Natural Law as obligatory

14 For this reason Natural Law was declared to be a 'perfect law' with 'coercive power' of Thomasius, *Instit. jur. div.* i, c. 1, §§109 sqq., Gundling, i, c. 1, §34, Achenwall, *Prolog.* §§58 sqq. and i, §§34 sqq., Wolff, *Instit.* §§8 sqq. [One exception was made], in regard to the relation of the sovereign to his subjects, the opponents of any right of resistance held that Natural Law had only a 'directive power' [over the sovereign], and therefore only imposed an 'imperfect obligation', but at the same time they did not abandon the idea that this imperfect obligation was a real legal obligation: cf. Pufendorf, *Elem.* i, d. 12, §6, *J. n. et g.* viii, c. 5, §8, viii, c. 1, Thomasius, loc. cit. §§111–13, J. H. Boehmer, *P. elem.* i, c. 3, iii, c. 1, Schmaus, v, c. 1, i. 1 and c. 3, ii. 1; Kreittmayr, §§32–5.

13 This idea is definitely formulated in e.g. Mevius, *Prodromus*, iii, §13, cf. also Montesquieu, *Esprit des lois*, i, c. 2.

16 Cf. Pufendorf, *De off. hom. et civ.* i, c. 3, *J. n. et g.* ii, c. 1, Thomasius, *Inst. jur. div.* i, c. 4, §§54–72, Beccaria, *Mod.* c. 2, *Cens.* p. 16, Hertius, *Comm.* i, 1, pp. 61 sqq. (*de restituendo primo naturali jurisprudentiae principio*), *Elem.* i, 3, 1, J. H. Boehmer, *P. gen.* c. 1. See also Mevius, iv, §35, and Mueldener, *Pr.* ii, §1, and (to some extent) Fénelon, c. 18 and Montesquieu, i, c. 2.

Socialists and Societas

17 Thomasius (*Inst. jur. div.* i, c. 4) expressly warns his readers against confusing *socialis* and *sociatas*. As against Hobbes and Spinoza, the advocates of *sociatas* contend that the state of nature was a state of peace, but they admit that this peace was unstable, and that it might at any moment (as still happens between States) pass into a state of war. Cf. Pufendorf, loc. cit., Hertius, ii, 3, pp. 21 sqq., Thomasius, *Inst. jur. div.* i, c. [3], §§51 sqq. and c. 4, §§54 sqq. (later, however, in *Fund.* i, c. 3, §55, he states the view that the state of nature was 'neither a state of war nor a state of peace, but a confused chaos', which was like war, yet not without a tendency towards peace). J. G. Boehmer, loc. cit. §98. The transition from mere *sociatas* to a definite 'society' is ascribed not to the operation of nature, but to reason and free choice, this is the view of Pufendorf, Hertius and Beccaria (loc. cit.). These thinkers also assume that there is no *sociatas* among States, cf. Beccaria, loc. cit., and Hertius, ii, 3, pp. 21 sqq. A different view, however, appears in Huber (i, 1, c. 5) and in Mevius (v, §§5–9, 18, 20), but they both regard *jus gentium* as being something more than mere natural law.

Positive law based on Natural Law

18 The theory appears in Pufendorf, Hertius, *Comm.* ii, 3, pp. 27 sqq.; Gundling, c. 1, §§77–9 and c. 3, J. G. Boehmer, c. 8, §§9 sqq., and other writers. Cf. also the view of Huber (i, 1, c. 3) that anything opposed to civil society cannot be Natural Law, because the *deterius secundum se* is natural. Stranch (*Op.* no. 16, *de jure nat. et gen. commentatio*) goes still further (in the way of connecting natural and positive law).

'Pure' natural law and 'Social' natural law

19. Thus Mevius distinguishes between *jus naturale primaevum* and *jus naturale secundarium et voluntarium*. The latter is based on reason itself, and not on the mere fact of agreement, but its rules have to be determined by the

principle of 'social conjunction' (v, §§5–9). It is in this latter category that he places international law, assuming the existence of a *rectus consensus inter omnes populos* (ibid. §§18–20).

Heineccius admits that natural law, in the narrower sense, refers only to free and equal individuals (I, c. 1, II, c. 1, §§1–10), but he holds that *jus gentium* [as distinct from Natural Law in this narrower sense] is *jus naturale* *quod homines inter se negotiaque eorum adeo adgravare gentium applicatum* (I, c. 1, §§21–22, II, c. 1, §21).

To Darjes, the 'moral state of state' is either 'natural' or 'adventitious', and the 'natural moral state', in turn, is either 'absolute' or 'conditional'. Proceeding with his subdivisions, he next lays it down that the absolute state of nature, which is marked by 'liberty' and 'equality', may be either a state of 'solitude' or of 'society', and, in the same way, the conditional state of nature may be either 'non-social' or 'social'. Finally, he classifies the 'civil state' as belonging to the last of these categories [i.e. it is a conditional state of nature of the social type], while he regards the state of the relations in which States stand to one another [i.e. the state of international relations] as a *status naturalis absolutus socialis* (cf. *Prolegg.* §§11–28, *P. spec.* §§790 sqq.).

Neuefeldt divides the whole body of 'natural jurisprudence' into that which is 'natural strictly so called' and that which is 'natural-social'. In his view, international law is a mixed body of law, composed both of *leges gentium stricte naturales* and of *leges sociales*—the reason being that the pure state of nature is here modified by the existence of a 'society constituted by nature' among all peoples (§§74 19–24).

Achenwall distinguishes between the *jus mere naturale*, which is valid in a state of nature, and the *jus mixtum naturale*, which is valid in a state of society, and includes the law of the Family, the law of the State and international law. At the same time, however, he holds that there is a sense in which pure natural law is itself social, for there is a *mentor moralis* or *mentor morum*—with God as its natural sovereign, and all men as its natural members—which lays down this *jus mere naturale*, and thus creates an obligation of sociability (cf. *Prolegg.* §§80–97, I, § 1, §§49–4, II, § 1).

Hoffbauer has a complicated scheme. (1) He starts from the exalted idea of a 'pure natural law' which is valid for all forms of 'rational existence'—including even other forms than man, if such were known—and is partly 'absolute' (pp. 64 sqq.) and partly 'conditional' (pp. 70 sqq.). (2) Descending in the scale, he comes next to the 'applied Natural Law' of man (pp. 86 sqq.). (3) Here he distinguishes between an 'absolute' form (pp. 108 sqq.) and a 'conditional' (pp. 120 sqq.). (4) He then divides the conditional form of applied natural law into the 'universal' (pp. 122 sqq.) and the 'particular' (pp. 155 sqq.). (5) Finally, he subdivides the 'particular conditional form of applied natural law' into the 'extra-social' (pp. 156 sqq.) and the 'social' varieties (pp. 186 sqq.). Only when he reaches this fifth and last stage in his process of classification does society first appear in his scheme. A final reference may be made to Cumberland, c. 5.

20. Gundling, for example (c. 3, §§11–50), begins with a primitive state of perfect liberty and equality, and explains all forms of connection between human beings as having been instituted by conscious agreement, in consequence of the discoveries made under the pressure of necessity. He describes the *status civilis* accordingly as a work of art and a *status artificiosus*. *Society as an 'artifice'*

Schmitz (1, c 1, 4. 1, §§ 1–9) also assumes a state of nature in which free and equal individuals have no form of union, but he believes that the whole of mankind never lived, or could have lived, in a pure state of nature at one and the same time.

Locke's state of nature

21 Locke (*Second Treatise*, II, c 2) regards the state of nature as the state which existed previously to the erection of civil society, but he also regards it as a state which still exists in the absence of civil society. From the latter point of view, he depicts the state of nature as a relation of man to man such as still occurs to-day, e g when a Swiss and a Red Indian meet in the backwoods of America (§ 14) He also speaks, it is true, of 'natural society'; but the only conclusion he draws from that idea is that men have a negative duty not to disturb or oppress one another (§§ 4–5) That he does not assume the existence of any real community is shown by his remarks about the substance of Natural Law, as something older and higher than all 'social laws' (ibid §§ 6, c 2, §§ 6–13, c 3, §§ 16–21, c 5, §§ 25–51, c 4, §§ 22–4). A similar view is to be found in Sidney, c 1, ss 2 and 9, c 2, ss 1 and 2

Rousseau's state of nature

22. Rousseau has already attained these views in the *Discours* of 1753, and repeats them in the *Contrat Social* [of 1762], 1, c 1 sqq He admits, indeed, that the Family is a natural *société*, but only until such time as the children are adults. Elsewhere says much the same in the state of nature there was no inequality other than physical, no law other than natural, no bonds other than those of friendship, necessity and the family' also, that things could not remain as they were (1, c 1) See also Sieyès, 1, pp 191 sqq, and 105 sqq

Primitive liberty as conceived by German thinkers

23 Thus Justi (*Der Natur und der Welt*, §§ 1–18) begins with an original state of nature which was marked by liberty and equality—a state in which men were half animals, and had no natural instinct for social life. Knowledge of the advantages of union first impelled them, after they had attained some degree of reason, to erect some form of society At first, the existence of such a society imposed no limits on natural liberty, and even to-day that government is still the best which realises the purpose of the State with the fewest possible limitations upon natural liberty. Justi takes a similar line in his *Grundriss* (§§ 5 ff), and he interprets international law in a corresponding sense (ibid §§ 222–3). Frederick the Great, writing in 1777, similarly assumes a pre-political condition, with no *société* (*Oeuvres*, IX, p 195)

In the view of Kreittmayr (§§ 1 sqq) the State is not based on *jus naturale absolutum*, it is based on history, as a *res mere facti*. Scheidemantel (I, pp. 44 sqq , 56 sqq , 68 sqq) holds that the State is not a necessity of man's nature, and that the Law of Nature does not impose upon him any binding obligation to renounce his natural liberty. A. L. von Schlözer regards primitive man as *homo solitarius*, and treats all social institutions as artificial inventions (pp 91 ff). Cf also C von Schlözer, *De jure agf* §§

Fichte on the origin of Right or law

24. *Grundlage des Naturrechts* (1796–7), vol 1, Introduction and pp 51 sqq (*Werke*, III, pp. 79 sqq and 17–91), where Fichte argues that the rule of Right, or law,* is deduced without the aid of morality, and yet without any surrender of the unity of law and morality That unity depends on the living self-consciousness of the Ego The Ego is one, but in the form of subjective instinct [*Trieb*] it produces morality, while in the form of force (as a fact of

* *Recht* here is more than our English 'law' (1) because, on its 'objective' side, it has a connotation of something inherently 'right' and (2) because it implies, on its other or 'subjective' side, the right of the individual.

objective existence) it produces law. In all essentials, Fichte maintains his earlier theory of the origin of the rule of Right in his later *System der Rechtslehre* [lectures delivered in 1812], printed in his *Posthumous Works*, II, pp. 495–499.

25. *Works*, III, pp. 92–99; cf. *Posthumous Works*, II, pp. 500–519.

26. *Works*, III, pp. 108–109: the original rule of Right is 'the absolute right of the personality to be nothing but a cause in the world of thought', i.e. the right of the absolute will, but the original rights of different persons cancel one another, unless each person limits himself.

27. *Works*, III, pp. 92–99: it is not an 'absolute', but a 'problematical' command.

28. *Works*, III, pp. 93–99, 140–149, 166–169. Subsequently, however, Fichte came to regard the existence of a legal community as an 'absolute law of the reason' and 'a necessity of thought', and he accordingly made the rule of Right issue in an obligation to make and keep contracts. But he still continued to hold the firm conviction that 'a state of law is never produced by mere nature . . . without art and free will, or without a contract' (*Posthumous Works*, II, pp. 495–500). *Fichte's later view of law*

29. *Works*, III, pp. 137–49; *Posthumous Works*, II, p. 499. The Law of Nature is not law proper, inasmuch as the Ego is absolute. Natural Law has no sanctions other than loyalty and good faith, which lie outside the bounds of law: any right of compulsion which each can exert upon each is not enough (to constitute a genuine legal sanction). On the other hand Right or law which is sanctioned by the force of the State is never Right unless it is based on reason. Both propositions are therefore true: (1) that 'all law is purely the law of reason' and (2) that 'all law is the law of the State'. *Natural and positive law in Fichte*

30. Cf. *Works*, VII, pp. 8–19, and see also, on the relation of law to morality, pp. 11–19, 13–19, 18–19 and 182–199, in which a particularly strong emphasis is laid on external compulsion as the essential attribute of law. *Kant on law*

31. *Works*, VII, pp. 62–99, §§ 14–17, p. 132, §45.

32. *Works*, VI, pp. 320, 415, VII, p. 54, §8, p. 130, §44, p. 107, §41. Fichte also used this principle in order to deduce from it a duty of States still living in a state of nature (in their external relations to one another) to form some union, cf. VI, pp. 415–419, VII, p. 162, §54, p. 168, §61.

33. *Works*, VII, pp. 20, 133: the will of the rational individual is its own legislator, but when it proceeds to enact a law for itself, it should always adopt a maxim which is qualified to be a universal law.

34. *Works*, VI, pp. 389, 409, VII, p. 133, §47.

35. On the position of Right or law before the State exists, see *Works*, VII, p. 130, §44.

On the State's obligation to respect the law of Reason which is given a priori, see VI, pp. 398, 413, VII, pp. 34, 131, §45, p. 136, §49. On the inviolability of the principles of the liberty, equality, and independence of every individual, and on the illegality of institutions (such as slavery, and also hereditary nobility) which are contrary to these principles, see VI, pp. 320–19, 416–19, VII, pp. 34–99, 147–99. *Kant on the State and the law of Reason*

36. See Pufendorf, *De off. hom. et cit.* I, c. 12, §§ 2–3; *J. n. et g.* IV, c. 4, §§ 1–14, c. 5, §§ 8–10; Thomasius, *Fund. jur. nat.* II, c. 9, §§ 58–95; *Fund.* II, c. 10, §§ 5–7; J. H. Boehmer, *P. spec.* II, c. 10; Heineccius, I, c. 9; Wolff, *Instit.* § 191; Nettelbladt, §§ 108–109; Achenwall, I, §§ 106–8, 118 (*omne res mutuae*, *Kant on property*

uno omnium), Kant, vii, pp. 49, 57, 61, 66. (Kant accepts *communio fundi originaria*, as a principle involving an original common ownership of the surface of the earth, but he does not believe in a *communio primaeva*, in the sense of a community of property erected at a point of time and contractually established by the pooling of private possessions.)

Survivals of original community

37. See e.g. Pufendorf, *J. n. et g.* iv, c. 4-6 and viii, c. 5, §7, on the remnants of the original community of property which may still be traced in the right of the State to ownerless things and in its domanial manner; Wolff, *Instit.* §§900–12, on the continuance of 'primitive community' in regard to air, water, mushrooms and the sea, and again in the case of *res nullius* and *res omnium nullius*; and Nettelbladt, §§471 sqq.

38. Wolff (§§194 sqq.), though he has previously depicted the original community of property as negative, sees no objection to making private property develop out of it by an act of division which is due to supervening needs, and is thus compatible with the law of nature.

Locke on property

39. According to Locke (ii, c. 5, §§25–31) the individual may acquire property by a legitimate title in the state of nature. Though all things are common, he has a private right in his person, and he may thus acquire things [for himself by annexing them to his person, i.e.] by mixture of labour, which also includes occupation. No contract or law need precede such acquisition; but limits are set to the acquisition of private property in virtue of Natural Law (1) by the measure of the individual's own need, and (2) by the requirement that there shall be a supply of equal and equally good things for all. (Locke thinks that these conditions are satisfied so far as land is concerned.)

General view that property is pre-social

40. See Hemocrus, i, c. 9; Schmoor, i, c. 1, n. 2, §3; Nettelbladt, §§471 sqq.; Achenwall, i, §§110 sqq. (private property comes into existence by 'conditional Natural Law' [cf. n. 19 supra], first by way of occupation, and then in v. of c.

The French physiocrats (Quesnay, Mercier de la Rivière, Dupont de Nemours and Turgot) are especially emphatic in proclaiming the origin of private property in the state of nature, and the duty of the State to recognise it in virtue of *les lois naturelles de l'ordre social*, cf. Roscher's *Nationalökonomik*, pp. 480 sqq., and Janet's *Histoire de la Science politique*, ii, pp. 684 sqq.

Rousseau on property

41. Rousseau, *Contr. soc.* i, c. 9, but the theory already appears in the *Discours* [of 1753]. Rousseau, however, regards the establishment of private property by an act of appropriation in the state of nature as a usurpation, which is only legitimised when, in the act of concluding the social contract, all men surrender to the sovereign all their belongings as well as their powers, and receive them back again from the sovereign as legal possessions under the limits determined by the law of the community.

Möser on property as the basis of the State

42. Justus Möser always treats property in land as the basis of perfect liberty; he regards land-owners as the 'original contracting parties' of the State, and other owners as shareholders in the State-partnership (in which originally the shares were only shares in land, though later there came to be also shares in money), and he therefore considers them to be the only fully qualified citizens (cf. his *Patriot. Phant.*, ii, no. 1, iii, no. 64, iv, no. 43).

Kant on freedom of property

43. According to Kant (*Werke*, vii, pp. 53 sqq. and 62 sqq.) there is already a real, if only provisional, *meum* and *tuum* in the state of nature, which first acquires a title of prescription [*peremptio*] and a guarantee in the civil state; cf. also pp. 56 sqq. and 64, on occupation as an original method of acquisi-

tion (but one which only exists in so far as the possession thus acquired can be actually defended)

Property as State-created

44 Thus Mevius (*Prudentia*, v, §42) derives private property from an act of concession by a *rectus mores* (under reservation for cases in which the *mores* itself is in need). Horn (II, cc. 3–4 and 8) ascribes its origin to an act of distribution by the sovereign, who has received authority from God for that purpose [cf. Paley, *Principles of Moral and Political Philosophy*, Book III, c. IV], and who continues to enjoy a real 'eminent domain'. Bossuet (I, art. 3, prop. 4) finds its source in a creative act of the government, and Alberti (c. 7, §19) derives it from a direct declaration of will by the community, which at one and the same time establishes property and the limits of property.

Property as based on contract

45. Pufendorf (loc. cit.) requires a *pactum tacitum* to bring private property into existence, and Gundling (c. 3, §§27–31, 39–42, and c. 20) makes *dominium*, like *imperium*, originate in a 'pact'. Similarly A. L. von Schlözer argues (p. 46, §11) that rightful acquisition of property first becomes possible after its original community has been abolished by contract, for even occupation, and the appropriation of things by labour, were only admitted as proper titles after other persons had 'renounced their joint right thereon' (p. 49).

Fichte on property

46 According to the theory originally developed by Fichte in his *Naturrecht* (*Works*, III, pp. 210 sqq.), but also maintained in his later period (*Posthumous Works*, pp. 528 sqq., 592 sqq., 594 sqq.), property arises from a contract of property, which is to be regarded as a part of the political contract, and thus it becomes possible only after the original right of each man to everything has been removed by an act of renunciation. Even so, however, 'absolute' property only exists in money and the value of money in exchange (in his *Rechtslehre* Fichte makes it also include house property), property in land still remains subject to obligations and limitations, and is only a 'relative' species of property. What is true of the right to own land is also true of the right to practise trade and industry, and the State has therefore to distribute rights of pursuing trades among its members, and to organise their industry, in order to satisfy the claim which all men have to subsistence. This constitutes the basis on which Fichte subsequently erected (in 1800) his theory of *Der geschlossene Handelsstaat* ('the close Trading-state'), with its economic omnipotence [cf. W. Wallace, *Lectures and Essays*, pp. 427 sqq.]

Theories of Society as original and divine

47 In Germany Fruchtus is conspicuous for his advocacy of the fundamentally social character of Natural Law. The primary principle of that law, he holds, is love, and the greatest of the duties based on that principle is devotion to others and especially to the whole. Society is God's will: it is, even more than the individual, the mirror of the Trinity, and the aim of nature's plan is not the individual, but society, cf. §9, *nihil triplex sit et in se amplitudo juris naturalis*, p. 47. The view of Placeus (Book I) is similar. Mevius (v, §4), Becker (§§5 and 12) and Alberti (c. 2, §9 and c. 10, §1) also assume the existence of an original community, of which traces continue still to exist in civil society.

According to Kestner, the source of Natural Law and society is not *natalitas* or *necessitas*, but the will of God (c. 1). Originally there existed a primitive *societas humana* which God had founded; the *imperium* in this society belonged to 'all mankind', and coercion was applied to misdoers by *certum collectivum*

simplex (c. 7, §2). After the disintegration of this unity the *imperium*, which 'hitherto belonged to all without distinction', passed to the separate 'societies' which were now established (c. 7, §3).

The two Cocceji (Henry and Samuel) similarly reject the principle of 'sociality', and base all social authority on the power over individuals originally bestowed by God on the whole body of mankind at large—a power which subsequently passed to separate peoples, when they arose, and from them in turn passed to their rulers. Later, however, Samuel Coccejí developed the view that political authority arises from the *imperium* over its own members originally bestowed by God on each family as a *civitas*—this *imperium* being afterwards transferred, with the aid of God's intervention, to the union of heads of families, and then at 'first from this union to a Ruler (*Nexus gent.* §§280, 612–15).

In France we find Bossuet regarding *sociétés* as the *fait premier*, and explaining the origin of *diverses nations*, as *sociétés civiles*, by the human passions which led to the disintegration of the primitive fraternal union of all mankind (1, art. 1–2).

In England, we find Filmer, in his *Patriarcha*, deriving all social authority from inheritance of the *patria potestas* bestowed by God upon Adam.

Individualism in eighteenth-century Germany

48. This individualism appears in Mevius (v, §§23, 25), Alberti (loc. cit.), Kestner (op. cit. §3), S. Coccejí (*Nex. gent.* III, §§190–207, where the theory of a contract is adopted). Thomasius, in spite of his assumption that there originally existed, *in statu naturae*, a community between God and man and a community of all men with one another, and that this double community was the source of a social law of nature (3, c. 8, §§27–43 and 51–54), none the less applies the individualistic theory of contract in his *Institutes of Divine Law*, and in his later writings he drops his whole theory of the *status naturae*, on the ground that such a state is beyond our knowledge.

Even in Leibniz and Wolff

49. Leibniz derives the existence of law from the community, and regards all communities as organic parts of the Kingdom of minds in the Universe at large, which constitutes a world-State under God's government (*Bruchstück von Naturrecht*, in Guhrauer, 1, pp. 414 sqq., and introduction to the *Cod. dipl. jur. gent.*, in Dutens' edition of his *Werke*, IV, 3, pp. 287 sqq.). At the same time he defines the State as a contractual association (*Caesar-Princ.* c. 10), he makes the basis of punishment consist in the promise made by each individual to observe laws and legal decisions (*Nat. meth.* II, §15), and he regards *consensus populi* as the source of the validity of all civil law (ibid. §71).

The idea of society as something naturally given still survives in the theory of Wolff, and it even leads him to think that peoples living in a state of nature form a natural society, which, as *civitas naturae*, possesses an *imperium universale* (*Instit.* §1096). But his whole argument proceeds, none the less, on the assumption of equal, free, and independent individuals (*Instit.* §§70 and 77, *Jur. nat.* 1, §§76 sqq.).

Intervention of Montesquieu

50. *Esprit des lois*, I, cc. 1–3. Natural laws exist before man and before society: pure natural law is valid for an *Homme avant l'établissement des sociétés*, and it produces, first the desire for peace, then the satisfaction of the needs of sustenance, then the beginnings of connection, and finally a *désir de vivre en société*. In society, because the feeling of weakness and equality disappears, wars arise, both within and without; and these produce on the one hand international law, and on the other a civil law which varies considerably [from one State to another], according to circumstances.

51. See Moser's *Complete History* and his *Patriotic Fantasies* supra, n. 42. For his objection to the law of Reason see esp. *Patriot Phant.* IV, no. 30, 'on the important distinction between actual and formal law'.

52. Vico starts from God and human nature: he believes that the primitive ideas of *honest* and *unjust* continue to survive, even after the Fall, as ideas of justice and sociability, and he regards utility not as the source, but only the occasion, of law and society. *Vico and Ferguson*

Ferguson, rejecting the supposed state of nature and the original contracts, prefers to take men as he finds them, i.e. as living in society, and he regards social progress not as the opposite of nature, but as its consummation (*Essay*, I, c. 1). But he too is inconsistent, and having rejected contract and a state of nature, he proceeds to ascribe the historical beginning of society to the operation of two instincts—the instinct of affection which unites, and that of independence which divides (ibid. cc. 2–4).

53. Herder's *Ideen zur Geschichte der Menschheit*, IX, c. 4.

54. Cf. supra, p. 46 and nn. 60 and 61 to § 14; Schmier, II, c. 1, § 9, §§ 1–3; Heineke, I, c. 2, §§ 9–11.

55. Thus Bossuet (1, art. 3, prop. 1–6), in agreement with Hobbes, holds that the State first comes into existence through the complete and irrevocable subjection of all men to one sovereign, under the compulsion of nature; previously there had only been an anarchical sort of multitude, which possessed no sovereignty before this act of subjection, just as it possesses none afterwards. Unlike Hobbes, however, he ascribes the origin of sovereignty to the will of God, and not to a contractual act of surrender of rights. A similar view is to be found in Fénelon, chap. VI; cf. also Alberti, c. 14, § 3. *Bossuet on the origin of the State*

56. Horn, II, c. 1; for further details see the author's work on Althusius, pp. 70–71.

57. Cf. supra, nn. 47–49 and 58–9 to this section.

58. Cf. supra, p. 60; Spinoza, *Tract. theol.-pol.* c. 16, *Tract. pol.* cc. 3–4; Goudling, *J.N.* c. 35 and *Doc.* c. 34.

59. Cf. supra, p. 46, and n. 63 to § 14; Locke, II, c. 7, §§ 87–9 (the surrender by all of their natural right to self-help, and the surrender of power to the community, constitute civil society) and also c. 12; Sidney, I, s. 10, II, ss. 4, 5 and 20 (all society is constituted by the free association of individuals, who 'recede from their own right').

60. Cf. supra, p. 46, and n. 63 to § 14; Huber, I, 2, c. 1; Pufendorf, *J. n. et g.* VII, cc. 2–3; *De off. hom. et cit.* II, c. 6; Thomasius, *Instit. jur. div.* III, c. 6; Hertius, *Comm.* I, 1, p. 286, § 1 (*coactus multorum hominum numerus secundum partes confluit, et pululate increscit*); Beckmann, cc. 3–6; J. G. Wachter, *Orig.* p. 34 (*coetus nihil aliud quam multitudo hominum majori utilitatis et securitatis gratia potestatem agendi suam naturalem versus juxtaposita ad producendum rationem et communem finem habentes*); J. H. Boehmer, *P. spec.* I, c. 1; Heineccius, II, §§ 14, 109 sqq.; Wolff, *Instit.* § 938; Darce, *Prolegg.* § 24; *P. spec.* § 655 (*non solummodo non erit in mare transferent personam ad plurium vel omnium*); Nettelbladt, *Syst. nat.* § 1 (5); Achenwall, II, §§ 8, 9, 11; Kreittmayr, § 2. *The community as a mere aggregate*

61. *Contr. soc.* I, c. 6 (*Faire un traité de chaque citoyen avec tout le reste le contrat social*); III, c. 18; IV, c. 2.

62. *Contr. soc.* II, c. 5. The individual, it is true, has no right to commit suicide, but he has a right *de renoncer au peu de vie* to renounce. On this principle, we may say that the man who is willing to preserve his life at the cost of others must also risk losing it for the sake of others, if that be necessary. His *Rousseau on punishment*

life, after the conclusion of the contract, is no longer a simple *transfert de la nature, mais un don conditionnel de l'Etat*: the sovereign has now a share in deciding when it is to be sacrificed. Thus even capital punishment has a basis in consent, though it is also a sort of war against an *ennemi public*.

68. Beccaria, § 2. In addition to the argument derived from the fact that suicide is wrong, Beccaria also presses into his service the assumption that the individual, in entering civil society, desired to incur the least possible sacrifice of his liberty.

State-power a pool of individual powers.

64. Even Montesquieu himself had suggested no other way [of explaining social authority], for according to the *Esprit des lois* (1, c. 3) *la réunion de toutes les forces particulières forme ce qu'on appelle l'Etat politique: les forces particulières ne peuvent pas se réunir sans que toutes les volontés se réunissent, la réunion de ces volontés est ce qu'on appelle l'Etat civil.*

Similarly Justi (*Natur und Wesen*, §§ 3–6) contends that the act of union in a moral body, which constitutes the moral basis of the State, depends on the union of many wills in a single will, and of all individual powers in a single power; this is the difference between the State and the state of nature, in which each will stands by itself.

A. L. von Schlözer (pp. 63 sqq. and 93, § 1) and C. von Schlözer (§ 11) both insist on the origin of the State in a mere union, which produces society, and a mere subjection, which creates authority.

The State as a share-company.

65. Cf. Justus Moser, *Patriot. Phant.* III, no. 62, on 'peasant properties considered as a form of share-holding'. All civil societies, he argues, are like share-companies: the citizen is one who is a shareholder. Originally there were only shares in land [cf. supra, n. 42]; subsequently, money-shares came into existence also, and nowadays all belongings, and even our bodies, are part of the capital. A slave [*Knecht*] is a man without a 'share' in the State, and therefore without loss or profit, but this contradicts religion no more than it does to be in the East India Company without holding a share. The basis of civil society is an express or tacit contract of society between the associated owners of land, who invest their properties as whole or half or quarter-shares, and a body of directors is instituted for the purpose of keeping up and getting in the contributions: cf. II, no. 11.

Compare also Sieyès (1789), I, pp. 283 sqq. and 345 sqq.: Individuals constitute a nation, as shareholders a company: the active citizens are 'the true shareholders in the great social undertaking', and the passive citizens (women, children and foreigners) are only protected persons. Sieyès is never tired of repeating that political authority is 'constituted' by individuals, and only by individuals, and that the individual will forms the only element in the general will (cf. I, pp. 145, 167, 207, 211, II, pp. 374 sqq.).

Fichte's early individualism.

66. In his *Beurtheilung* of 1793 ['Contribution to the judgment of public opinion on the French Revolution'], Fichte derives the State, as he also derives law, from the individual will, since 'no man can rightfully be bound except by himself' (*Werke*, VI, pp. 80 sqq., cf. also pp. 101, 109 sqq., 115 sqq.). In the same way he makes the beginning of the State, under the régime of Natural Law, depend on contracts, under which individuals agree to pool a part of their rights—renouncing the residue of their property in return for the guarantee of a fixed part, and pledging themselves to pay a fixed contribution to the protecting authority (*Werke*, III, p. 607, cf. II, pp. 109 sqq. and III, pp. 269 sqq.).

In his *Grundzüge* of 1804–5 ['The Characteristics of the present Epoch']

we find a changed the State is not to be interpreted, 'as if it were based on this or that set of individuals, or as if it were based on individuals at all, or composed of them' (*Werke*, vii, p. 146)

Kant bases the State on individuals

87. See Kant's *Rechtslehre*, §47 (*Werke*, vii, p. 133), on 'the original contract by which all the members of a people (*omnes et singuli*) surrender their external liberty, in order to receive it back again at once as members of a commonwealth, i.e. of the people regarded as a State (*universi*)'. [Kant adds that the individual, by this seeming surrender, 'has totally abandoned his wild lawless freedom in order to find his entire freedom again undiminished in a lawful dependence, that is, in a condition of right or law—undiminished, because this dependence springs from his own legislative will'.]

The Two Contract theory

88. This is the theory which appears in Huber, I, 2, cc. 1–2 (with a division of the contract of association into the three stages of a treaty of peace, a union of wills and the formation of a constitution, c. 1, §§1–13), Becmann, c. 10, §4, J. H. Boehmer, 1, c. 1, Wolff, *Jus nat.* §§972 sqq., *Jus nat.* viii, §§42 sqq., S. Cocceji, *Nat. gent.* iii, §§612 sqq. and 616 sqq., Darjes, *P. gen.* §659, Nettelbladt, §§1124 sqq.; Heineccius, 1, c. 2, §§1 sqq., Schedemantel, 1, pp. 63 sqq.

According to A. L. von Schlozer, pp. 63 sqq. and 73 sqq., the civil society established by the *pactum unionis* lasts for centuries without any government courts or coercion, until disturbances appear and the State is erected by a *pactum subjectionis*, cf. also pp. 95, 96 and 173 sqq.

The distinction between the two contracts finds an echo also in Justi, *Natur und Wesen*, §§73–7.

In Sidney (c. 1, st. 6, 10, 11, 16, 20, c. 8, st. 4, 5, 7, 20, 31, and c. 11, st. 18, 25, 31) and Locke (2, c. 7, §§87 sqq., c. 8) the contract of subjection recedes into the background in comparison with the contract of unions, but it is by no means entirely abandoned. [More exactly, we may say that Locke uses the conception of Trust, and not that of Contract, to explain 'subjection'. The trust is a conception peculiar, on the whole, to English law. In private law [*Privatrecht*] the trust means that *A*, as trustor, vests rights in *B*, as trustee, for the benefit of *C*, as *cestui que trust* or beneficiary of the trust. In public law [*Staatsrecht*], to which Locke may be said to transfer the doctrine of trust, the People or 'Public' (which is both the trustor and the *cestui que trust*) acts in its capacity of trustor by way of conferring a 'fiduciary power' on the legislature (which thus becomes a trustee), for the benefit of itself, and all its members, in its other capacity of *cestui que trust* or beneficiary of the trust. This 'trust' conception pervades English political thought in the eighteenth century, not only in it applied internally, to the relations between the Public and the 'supreme legislature', it is also applied (for example by Burke) externally, to the relations between Great Britain and India, which is regarded as held in trust for the benefit of the people of India.

[Locke's theory of Trust]

A trust is not a contract, and the trustee does not enter into relations of contract with the trustor—or with the beneficiary. Roughly, he may be said to consent to incur a unilateral obligation—an obligation to the beneficiary which, if it implies the trustee's possession and vindication of rights against other parties on behalf of that beneficiary, implies no rights for the trustee himself on his own behalf. If therefore political power be regarded as a trust, it follows that the Sovereign has not entered into a contract with the People, or the People with him—whether we regard the People as trustor or as beneficiary of the trust. The trust, in its application to politics, leaves no

room for a 'contract of subjection'. We may say that Locke did not assign a contractual position to the sovereign because it would have given him rights of his own, derived from the contract, and he had no wish to vest the sovereign with *agency Rechts*. Conversely we may say that Hobbes (who equally leaves no room for a 'contract of subjection') did not assign a contractual position to the People because it would have given it rights of its own, and he had no wish to vest the People with *agency Rechts*.]

68. See Pufendorf, *De off. hom. et civ.* II, c. 6, *J. N. et G.* VII, cc. 2 and 3, §6. The same intercalation of constitution-making appears in Thomasius, *Inst. jur. div.* III, c. 6, §§29–31; Hertius, *Elem.* I, c. 9, *De mod. cont.* c. 1, §§2–9; Schmier, I, c. 2, s. 4, §3; Kestner, c. 7, §9; Heineccius, II, c. 6, §§109–12; Ickstatt, §§11–14.

70. This is the view of Achenwall, II, §§51–6, and of Hoffbauer, pp. 187–207.

71. See *supra*, p. 60 and n. 147 to §14; cf. also Spinoza, *Tract. theol.-pol.* c. 16, *Tract. pol.* c. 3, §6, cc. 6, 7, §26, c. 11, §§1–4. The same view appears in Hortuynius, *Pol.* §§ 199, 10–14, Titius, *Spec. jur. publ.* VII, c. 7, §§ 17 sqq. and note to Pufendorf, *De off. hom. et civ.* II, c. 6, §8, Gundling, *J. nat.* c. 35 and *Dux* c. 34, §§1–17.

The Two Contract theory

72. Cf. Rousseau, I, cc. 5–6 and III, cc. 1, 16–18 (with the author's work on Althusius, pp. 116–17 and p. 347 n. 50). Frederick the Great also believed in a constituent *pacta social* (*Oeuvres*, IX, pp. 195 sqq., 205), and the Kirs also appears in Filangieri, loc. cit., Moser, *Patriot. Phant.* II, nos. 1 and 62, and Smyth, I, pp. 189 sqq. The contractual theory of Fichte also supposes only a single contract of all men with all men, the 'contract of state-citizenship', but this single contract is composed of three fundamental contracts—that of 'property', that of 'protection', and that of 'association' (*Werke*, III, pp. 189 sqq. and 191 sqq., but in the *Posthumous Works*, II, pp. 459 sqq., his view is somewhat different). Kant always interprets the political contract as a single *pactum unionis civilis*; *Werke*, VI, p. 320, VII, p. 133.

Psychological nature and legal act

73. This is the line of thought which appears in Huber, I, 2, c. 1, §§1 sqq. (man's innate idea of justice and his natural desire for society both impel him to the making of contracts, which remain, however, free acts of his will), Schmier, I, c. 2, s. 4, §9 (although the natural instinct for company which God has planted in man impels him towards society and the State, it is a matter of liberty for the individual whether *inter omnes sint pangere et alienatio imperium aliquorum sibi*). S. Cocceji, op. cit. III, §200 (*natura ruebat per pacta*), Heineccius, I, c. 1, §§1 sqq. (*ius ex naturali* is the *causa impulsiva*, and *pactum* the *modus constituendi*). The same is also true, to a certain extent, of Grotius, and of all the advocates of the theory of 'sociability', cf. *supra*, n. 16 to this section.

74. See Hobbes, *De cive*, c. 1 sqq., *Leviathan*, cc. 13–14, Gundling, *Jus nat.* c. 35, *Dux* c. 34, Kestner, c. 7, §3; Darjes, §657. Similar ideas are to be found in Thomasius, *Inst. jur. div.* III, c. 1, §§4–10 and III, c. 6, §§2–28 (it is not an impelling interest which brings the State into being—for nature impels men, on the contrary, towards liberty and equality—but the impelling interest of fear and necessity). Compare Schrodermantel, I, pp. 44–70 (the foundation of States is due in the first place to fear, and secondarily to other impulses leading men to renounce their natural liberty, but it is only achieved by free legal action).

J. H. Boehmer (*P. jus.* I, c. 1) thinks the primary cause of the founding

of States to be *malesta suprémorum*, first producing bands of robbers, and then associations for mutual defence against these bands, and a similar view occurs in Heineccius, II, c. 5, §§ 100–4, and in Kreittmayr, §§.

76. Thus Pufendorf regards *sociatas* as the primary and *unio* as the secondary cause of the founding of States, but he makes consent the constitutive factor, *J. n. et g.* II, cc. 1–2, VIII, c. 1, *De off. hom. et cit.* II, cc. 1, 5. Cf. also Locke, II, c. 7, §§87 sqq. and c. 9.

76. Kant, *Werke*, VI, pp. 320, 415, VII, pp. 54, 60 sqq., 130, 160, 168.

77. Just as Althusius had already insisted (*Polit.* c. 1, §§ 28–9) that union in a civil society came about *uno consensu*, so the voluntary character of the conclusion of a contract is strongly emphasised, on the one hand by [the absolutists] Hobbes, Spinoza, Gundling, etc., and on the other by [the radicals] Sidney, c. II, s. 5, and Locke, II, c. 8, §§95 and 99. Wolff (*Instit.* §972) and Achenwall (II, §99) also speak of the *liberum arbitrium* which is the decisive factor in the foundation of society. Pufendorf (*J. n. et g.* VII, c. 2, §7 and *De off. hom. et cit.* II, c. 6, §7), Schmier (see n. 79 to this section) and many other writers expressly reserve the right of every individual to stand aloof and remain in the state of nature. J. H. Boehmer denies the 'absolute necessity' of forming a State. Schedemannel (I, pp. 68 sqq.) thinks that the State is not a necessity of human nature, and that the law of nature imposes no inevitable duty of surrendering liberty. It is only in certain circumstances that the State is necessary. Rousseau (*Contr. soc.* I, c. 6) insists even more upon liberty. He goes to the length of proclaiming (ibid. IV, c. 2) that *l'assentiment exclut tout l'acte de renoncer à plus volontiers*: the man who opposes it cannot be compelled to join, but he is *étranger parmi les citoyens*. The same view recurs in Moser, A. L. von Schlözer and Sieyès, but Fichte goes further, holding that it is inconceivable that there should ever be any other legislator for an individual than his own will and his own deliberate and permanent purpose (*Werke*, VI, pp. 80 sqq. and 101), and that the conclusion of the contract of State-citizenship is therefore purely a matter of free will (*Werke*, III, p. 201).

General view that society is the result of a free legal act

78. According to Hobbes, Beneiam, Gundling, etc., but equally also according to Rousseau (*Contr. soc.* I, c. 6), an understanding of the impossibility of the state of nature precedes the formation of the contract. In Spinoza (*Tract. theol.-pol.* c. 16, *Tract. pol.* cc. 3–4) reason takes a foremost place. In Sidney (II, s. 4), Locke (II, cc. 7, 9), Wolff (*Jus nat.* VIII, §§ 1 sqq.) and Achenwall (II, §99), a process of deliberation and reflection, leading to a sense of the utility of social life, is supposed. A. L. von Schlözer speaks of the State as 'invented'. In Fichte and Kant reason rules in full sovereignty.

The act a calculated act of reason

79. Cf. supra, p. 105.

80. Cf. supra, p. 106.

81. Cf. supra, pp. 106–107.

82. This is an admission which appears in Huber, I, 2, c. 1, §§33–5 ('on occasions'), Pufendorf, *J. n. et g.* VII, c. 2, §10 and *De off. hom. et cit.* II, c. 6, §13, Titius, *Spec. jur. publ.* IV, c. 10, §§8 sqq., VII, c. 7, §§1 sqq., and Notes to Pufendorf's *De off. hom. et cit.* II, c. 6, §8, Schmier, I, c. 1, s. 4, §3, no. 188; Locke, II, c. 8, §§101–12, Heineccius, I, c. 2, §§2 sqq. ('as a rule'), Justi, *Natur und Wesen*, §27 (contracts, resolutions and decrees are not essential rules came into being afterwards, for the most part gradually and tacitly).

The idea of a tacit contract

83. Cf. Huber, I, c. 1, §§14–26, Hertius, *De modo contr.* c. 1, §§4–5, p. 289, Sidney, c. 3, s. 31 (until consent is there, the union only exists *de facto*),

Force and consent

Locke, II, c. 8, c. 17 (until that time, there is only the appearance of a society); Achenwall, III, §98. Cf. also Rousseau, I, c. 3, Hemecrius, II, c. 6, §§106 and 113, and A. L. von Schlözer, p. 95, §2.

Schedemantel, on the other hand (I, pp. 65 sqq.) regards war, along with contract, as a rightful way of founding a State; cf. also Darot, §659, and Henecke, I, c. 2, §8.

The contract as 'an idea of reason'

84. Cf. Kant, *Werke*, VI, pp. 379, 394, 416 sqq.; VII, p. 193. A similar theory already appears in Boeckaen, *Comp.* p. 13, and in Krettmayr, §3. Thomasius also suggests (in *Fund.* III, c. 6, §§2–6) that

[illegible] down previously, I [illegible] *tabula c. tabula rasa* subsist at *a quasi contract* [illegible] *a facto fin*

[illegible] these line [illegible] 6 has been much discussed—arising fro[illegible] the c[illegible] 4, advanced by several writers, that the social contract is for R[illegible] on [as well as for [illegible]] only as 'idea' [i.e. only a logical postulate, and not a [illegible] time]—with regard to the extent to which the social contract had been already interpreted in a purely 'ideal' sense before the day of Kant. See, in this matter, the *Addendum* to p. 701 of the author's work on Althusius (pp. 347–50 of the 2nd and 3rd edition).

85. Cf. *supra*, pp. 47 sqq., nn. 70–4 to §14, Pufendorf, *J. n. et g.* VII, c. 2, §§7 and 15, c. 3, §6, and *De off. hom. et cit.* II, c. 6, §§7, 12, Thomasius, *Inst. jur. div.* III, c. 6, §64, Locke, II, c. 8, §§97 sqq., Rousseau, IV, c. 2, Hoffbauer, p. 240.

86. The question is raised most vigorously by Fichte, *Works*, III, pp. 18, 154, 178 sqq., 184 sqq.

Contract remains by each generation

87. Pufendorf (*J. n. et g.* VII, c. 2, §20 and *De off. hom. et civ.* II, c. 6, §13) regards subjection as incumbent without any question on later generations, and it is only the subjection of fresh immigrants which he refers to a 'tacit pact' concluded at the time of their entry into the country. The same view occurs in Hertius, *De mode. imp.* c. 1, §§7–8, and in Titius, loc. cit.

Locke, on the other hand, rejects the idea that descendants are bound by the act of their ancestors, and he assumes a free act of agreement with the State, at the time of coming of age, which is evidenced by remaining in the country (II, c. 8, §§113–22). Similarly Rousseau writes (IV, c. 2), *quand l'État est institué, le consentement est dans la résidence.* Cf. Hoffbauer, pp. 189 and 240 sqq.

Freedom to renounce the contract

88. Pufendorf, Schmier, Locke, Rousseau and other writers, who expressly emphasise the right of individuals to keep aloof from contracts and to remain in the state of nature, none the less admit that when once accession has been expressly or tacitly declared, it is binding for life (*supra*, nn. 73, 77 and 78). Rousseau (III, c. 18) argues that it is only the sovereign community which can at any time annul the contract.

Fichte, however, argues that not only can a civil society itself alter its constitution at any time in spite of any provision in the contract to the opposite effect (*Works*, VI, pp. 105 sqq.), but each individual can also secede from the society at any time by virtue of his own free inalienable will, since it is the 'inalienable right of man to annul his contracts, even by unilateral act, as soon as he wills to do so' (pp. 115 sqq. and 159). In the same way a number of persons have the like right, and if they exercise it, their relations to the State are thenceforth only relations of natural law, so that they can conclude a new civic contract, and are thus able to erect a 'State within the

State' at will (ibid. pp. 148–99), the famous example of such a procedure given by Fichte is the 'European State' of the Jews, but 'partial' examples which he cites are the army, the nobility and the hierarchy)

88. After Althusius had generalized the theory of a social contract [i.e. applied it to all forms of association], in a radical sense, and after Grotius had accepted this generalization with some modifications, and Hobbes had incorporated it into his absolutist system (supra, § 15, pp. 62–92), the thinkers who succeeded them—Pufendorf, Thomasius, J. H. Boehmer, Wolff, Daries, Nettelbladt, Achenwall, Hoffbauer, etc.—continued to follow this line of thought. We must admit one exception. Rousseau's conception of the political contract [as the one and only contract] leaves no room whatsoever for other forms of social contract [resulting in societies other than the State]. *Contract the basis of all associations*

90. See below. [Gierke's reference is perhaps to the intended section, which was never written, on *die Korporationstheorie* in *Kirchenrecht*. As his work stands, there is only a slight reference to the Church at the end of § 18, p. 198.]

91. To meet the case of the Family, a category of 'necessary societies' was often added to the category of 'voluntary societies' in which the State and the Church were both included: cf. e.g. Daries, § 549, Nettelbladt, § 332, Achenwall, II, § 9. Many thinkers also included the *societas gentium* among the necessary societies which were not dependent for their origin on an act of will: cf. Thomasius, *Inst. jur. div.* III, c. 1, §§ 499, and Daries, § 549. But the difficulty of ascribing the origin of the Family-association, like that of other associations, to an act of contract, was often quietly evaded, and without further ado contract was declared to be the one and only source of all forms of social obligation—cf. Hoffbauer, p. 187, G. von Schlözer, § 3, Fichte, *Werke*, VI, pp. 809ff. Wolff takes this line (*Jurisp.* § 896), but he prudently mentions quasi-contract in addition to contract proper. *The Family as based on contract*

92. Thomasius (*Inst. jur. div.* III, c. 1, §§ 4–10), Schmier (I, c. 2, m. 1–3), Gundling (c. 3, §§ 49–55 and cc. 26ff.), and other writers still continue to treat *societas patrum* and *societas dominorum* as being both equally non-contractual societies, while they regard *societas herilis* [the 'society' of master and servant—the third of the three sub-groups which together constitute the Family] as derived from contract. But Gundling adds that the authority of the father and that of the husband are not true forms of *imperium*. *Theories of the Family*

Locke (II, c. 6, §§ 52–76) regards only patriarchal authority—which he holds, however, to be a matter of duty rather than of right—as belonging to the state of nature. Rousseau (I, c. 2) pronounces the Family to be the oldest and the only natural society, but he argues that it continues to be natural only until the children have come of age, and that after that time it depends, like other societies, partly on contract. Most of the writers on natural law specifically include marriage among the *societates coniugales*: cf. e.g. Daries, § 549, Nettelbladt, § 333, Achenwall, II, §§ 42–52. This view is expressed most vigorously by W. von Humboldt (p. 101), and he draws from it the conclusion that marriage should be freely dissoluble, the same conclusion appears in Hoffbauer, pp. 209–19.

93. Such theocratical assumptions are to be found in Prasichius, Placcius, H. Cocceji and the earlier works of S. Cocceji, cf. supra, n. 47. They are also to be found in Filmer (who derives all authority from the paternal power *Theocratic views of the origin of the State*

bestowed directly by God upon Adam), in ouract (7, art. 5, prop 4); and in Fénelon (c. v and conclus. 1). F. C v n Moser, in opposition to the 'dreams' of a social contract, also appeals to the idea of the divine origin of the State (*Neues patriot. Archiv*, vol. 1), for his view see A. L. von Schlözer, *Staatsrecht*, pp 175 sqq.

Hotz's attack on the Social Contract

94. Horn attacks both the conceptions of contract. He attacks the conception of the contractual foundation of human society [the *Gesellschaftsvertrag*], on the ground that men had never lived in isolation and had never come together for the first time to make such a contract (1, c 4, §§3–6), and he attacks the conception of the derivation of political authority from an act of contractual devolution [the *Herrschaftsvertrag*]—whether such devolution be regarded as made by the community (11, c. 1, §§17–18), or by individuals (ibid. §19)—on the ground that there is no community distinct from the aggregation of individuals, and that individuals had never possessed a sovereignty to devolve. He declares not only the theories of Barclay, Salmasius and Grotius, but also that of Hobbes, to be revolutionary, and a danger to the State, since every *pactum* made by men can also be unmade. Just as he rejects the social contract as an explanation of the State's origin, so he rejects military force (ibid c. 13), natural evolution (§14), the *per naturale et gratuitum* (§15), and *accursus et indigestus* (§16)

His view of authority as given by God

95. Horn admits that the *auctor* is constituted 'by nature' alone, but he holds that the *republica*, which presupposes 'majesty', *non natura constituitur* (1, c. 4, §§3–6) God Himself is the 'sole and unique and direct cause of majesty', by communicating a part of His own authority to the monarch and thus appointing him 'vicar of God' (11, c. 1, §§4–12). Conquest, election, hereditary succession, and even actual appointment and investiture, are only *mere conquesta*, and they are destitute of constitutive or creative power (ibid §§13–21) * In the same way the authority of the husband does not depend on any 'devolution' by the wife, *sed quamprimum natus, mutuo a Deo consequitur potestatem in uxorem* (ibid §13).

Yet he admits secular authority in Republics

96 Horn, III, c. iii §§1–4. True, genuine 'majesty' never exists in a republic, because such majesty can only be the 'work of Almighty God'. The subjection of individuals in a republican State is limited to the extent of their consent there is no 'eminent domain', and capital punishment is properly speaking excluded But by 'pacts and conventions' formed in imitation of monarchy something like subjection is assumed in a republic, *quasi officiosam consensus abstinet* A substitute is ultimately found even for 'eminent domain', as a result of the *secretus consensus* into which the citizens of a republic enter;† and capital punishment itself is made possible by treatment of the criminal as an enemy and by the assumption of a previous act of consent to its infliction

97 This revival of a philosophical theory of the natural origin of the State appears especially among political thinkers with an Aristotelian tend-

* I e. they are ways of acquiring an authority already existing, because already constituted by God, but they do not cause such authority to exist, or constitute it as such

† In a monarchy, the State's right of 'eminent domain', which enables it to expropriate land for a public purpose, is due to the fact that the King, as God's vicar, possesses God's final ownership In a republic, the State may still expropriate land, but its right depends on the fact that the citizens have formed themselves into a company and made that company the final owner of the land.

ency of the author's work on Althusius, p. 100 n. 68, Boecler, 1, c. 1, Knichen, 1, c. 1, th. 2, c. 8, th. 2, Rachelius, 1, tit. 12, §§ 2 and tit. 14–91.

98. Particularly by Vico and Ferguson (n. 50 supra).

99. This is the case with Leibniz (supra, n. 50) and Montesquieu (supra, n. 51). Even Herder (op. cit. pp. 210–22) does not eliminate contract altogether. It is only the 'first class, that of natural governments', which, in his view, depends upon the natural order of the family; the 'second class' is composed of communities based on 'contract or convention', and the 'third class' consists 'of hereditary governments over men', which arose from war and force, but are legalized by a 'tacit contract'. *Even Herder uses the idea of Contract*

100. Such moderate opposition is to be found in Justi (supra, n. 80).

101. Hume (*Essays*, II, 6) argues that the duty of obedience to the State cannot be based on a foundation of contract, because the actual promise of our ancestors no longer binds us to-day, and the assumption that all were born free, and only became members of the State by virtue of their own promise, is contradicted by experience. As a matter of fact, every man feels himself obliged without further question, and his remaining in the country does not depend on his free choice, and cannot therefore be interpreted as an act of consent. The real legal ground of the duty of obedience is the fact that we feel it to be a duty to obey, when once our primitive instincts of disobedience and subjection have been modified by a growing recognition that it is impossible for society to endure without obedience (pp. 269–303). *Hume on the Social Contract*

But Hume regards the making of an original contract, with a provision for resistance, as an actual fact. True we possess no documents to attest the fact, because the contract was made in the woods, before the discovery of writing, and it was not written on parchment or the bark of trees. But we may read it in the nature of man, since the surrender of our natural liberty in favour of our fellows could only come about by voluntary choice, and the beginnings of a government could not arise in the absence of consent (pp. 265–9). Cf. also *Essays*, II, 2.

102. This conception of the purpose of the State appears most definitely in Hobbes and the absolutists who adopted his views, cf. supra, nn. 74 and 78. It also appears in Rousseau, who (I, c. 6) regards the fundamental problem as being 'to find a form of association *qui défende et protège de toute la force commune la personne et les biens de chaque associé*, without abolishing the liberty and equality of all'. see the author's work on Althusius, p. 345, n. 47, and see also p. 113 infra. *Rousseau's view of the purpose of the State*

103. This proposition [that the purpose of the State determines the extent of its authority] was never contested by the absolutists, it is the basis of the deductions of Spinoza (*Tract. theol.-pol.* cc. 16–17 and 20), and it is employed by Rousseau (I, c. 6, II, c. 4). It is expressly formulated by a number of writers—e.g. Hertius, *De modo cont.* c. 1, §6 (the citizens are not absolutely bound, either to one another or to the Ruler, but only *quatenus ad finem societatis obtinendum expedit*, since it is not to be supposed that any further obligation has been intended), J. H. Boehmer, *P. spec.* 4, c. 5, §§ 20–30, Wolff, *Instr.* §980, *Jus. nat.* VIII, §§35, 37, *Pol.* §213, Locke, II, c. 9, §131, Achenwall, II, §§10, 98, Darios, §§26 and 780–9 (in all States, certain 'natural liberty' or political authority flow from the *status civitatis*: these are the only limits which exist in a *civitas necessaria*, but *limites pactis* may also exist in addition in a *civitas voluntaria*), Beccaria, §2, Kreittmayr, §§1–2, Schoedermantel, III, pp. 399 sqq. *The power of the State limited by its end*

Even the absolutists admit limits on the State

104. *Cf. Leviathan*, c. 21, on the matters which in their nature are not subject to the authority of the State; see also cc. 17–19, 21, 24, 26 and *De cive*, cc. 5–7, 14. Mevius (*Prodromus*, vi, §§ 1 sqq.) is like Hobbes in holding that men have submitted everything to the State—including even the rights which they hold by nature—and that no man, therefore, can invoke the law of nature against the State. But he recognizes that the dictates of *jus naturale* and *jus divinum* in regard to the rights of the individual are objective limits on the exercise of authority by the State. A similar view, though it rests on a different basis, is to be found in Horn, ii, c. 2, § 10 and c. 12, §§ 2–13, Bossuet, vi, a. 2 and viii, a. 2, Fénelon, c. 22.

Spinoza on the State's limits

105. Spinoza regards each individual as having transferred all his power, and thereby *omne jus suum*, to the community, which thus possesses absolute power over all men. *Tract. theol.-pol.* c. 16, *Tract. pol.* cc. 3–4. But the authority of the State is limited, none the less, by the natural law of its own power. It cannot really issue any command, nor can the subject really transfer anything, inasmuch as he necessarily remains a man, and therefore a being who is spiritually and morally free. More especially, the individual reserves for himself the power of thinking what he likes, and of expressing his opinions orally and in writing. But where the power of the State ends, its right also ends, and reason, which always considers its own interest, impels the State accordingly to limit itself, in order that it may not suffer the loss of its power, and thus of its right, through resistance. In this way the State attains a recognition of the 'dictate of reason'—that its true object is not domination, but liberty. Cf. *Tract. theol.-pol.* cc. 16–17 and 20, *Tract. pol.* c. 3, §§ 5–9, c. 4, § 4, c. 5, §§ 1–7. [It would thus seem to follow that Spinoza is not, after all, one of the 'absolutists', as has been suggested previously.]

The reader is referred, for an account of the views recently expressed by Menzel [*Wandlungen in der Staatslehre Spinoza's*, Stuttgart, 1898], which to some extent diverge from those stated here, to the Addenda to the author's work on Althusius [2nd edition], pp. 348 sqq., nn. 39–41, and p. 346 n. 49, and also to the Addenda to the 3rd edition, nn. 54–7. [The English reader may be also referred to Duff, *The Moral and Political Ideas of Spinoza*.]

106. *Contr. soc.* i, c. 6 (*l'aliénation totale de chaque associé avec tous ses droits à toute la communauté*), cf. also c. 7.

Rousseau on the rights of man

107. Ibid. iv, c. 3. Although there can be no legal limits upon the sovereign power of the social body over its members, there are inherent limits arising from the very nature of the general will, of which all individual wills are part, and which can only will what is equal and just for all. Absolute as the sovereign may be, it can never really burden one subject more heavily than another, *faute qu'alors l'affaire devenant particulière son pouvoir n'est plus compétent*, and thus the individual, in the last resort, has not made any real alienation, but rather an advantageous exchange, receiving back for what he has given a greater security of his liberty, his equality and his life. This is not logic, and it is in vain that Rousseau tries to shelter himself, in a footnote, from a charge of illogicality. The reader is referred, for an account of the rigorous controversy which has arisen recently in regard to Rousseau's attitude to the theory of the rights of man, to the Addenda to the author's work on Althusius [2nd edition], p. 347 n. 50, and to the Addenda to the 3rd edition, n. 69.

108. Seyès expressly says that societies only exist for the sake of individuals, and that the happiness of individuals is the only object of the social

state *Werke*, II, p. 30, I, pp. 417, 431. But the purpose of the State is also (if only implicitly) made to consist in the happiness of individuals, when it is defined by Hertius (n. 1, § 1) as *tranquillitas et beata vita*, or by Wachter (p. 34) as *status et commoditas fidelium*, or by Wolff (*Jus nat.* § 972 and *Jus nat.* VIII, § 14) as *sufficientia vitae, tranquillitas et securitas*. Salus publica as consisting in the happiness of individuals.

There is less of an individualistic urge in the formula of Justi (*Natur und Wesen*, §§ 90–94). He makes 'the common happiness of the whole State' the object of commonwealths and their sovereign law (though he adds that, sovereign as it may be, it can never warrant any actions that is unjust in itself); he regards liberty, security and internal strength as the main elements of this happiness, but otherwise he leaves each people free to determine the particular objects of its own life. But even Justi adds that the 'common happiness' consists pre-eminently in the happiness of the subjects, and secondarily [illegible] of the Ruler.

A. L. von Schlözer (pp. 176 f.) distinguishes between (1) the *fines negotiorum* of the State, which is limited to securing and protecting, as against fellow-citizens, aliens and natural causes, the four kinds of property (in a man's person, his possessions, his honour and his religion), and (2) the *fines pontes*, which come to be added with the development of civilisation, and are directed to the advancement of prosperity, population and enlightenment (cf. p. 93, § 1).

109. The purpose of the State is defined by Kemmerer (c. 7, § 4 and §§ 17 sqq.) as *justitia colenda*, by S. de Cocceji (*Nov. syst.* §§ 186 and 613), as *defensio jurium singulorum*, by Hemmerich (§ 107), as *securitas civium*, by Darius (*Prassage* § 24 and *P. spec.* §§ 656 and 664–6), as *securitas*, by Hoffbauer (pp. 236 sqq.), as legal security, by Schesdemantel (1, p. 70), as 'the attainment of internal and external security by means of united resources', by Klein (II, pp. 55 sqq.), as 'protection of social life'. In Erlangen (1, cc. 1–12) the purpose is *conservatio et tranquillitas*; in Mercier de la Rivière, Turgot and the other Physiocrats, it is *libertè et sûreté* of person and property; in Hume (*Essays*, II, no. 3) it is simply justice, and King, Parliament, ministers and the rest—including even the clergy—properly exist only in order to support the twelve jurymen. *Definitions of the State's purpose*

110. Locke (*ib.* c. 9, §§ 123–31), following the idea of 'insurance', denies any other purpose to the State than that of guaranteeing natural rights, particularly the rights of 'liberty and property'. *The State as an insurance society*

In the theory of W. von Humboldt the final object of human existence is the development of personality (pp. 9 sqq.). The State is only a means for attaining that security of its citizens, and thereby that 'consciousness of legal freedom', which are the indispensable conditions of such development (pp. 16 sqq.). Security has to be attained both in regard to enemies without (pp. 47 sqq.) and between the citizens themselves (pp. 53 sqq.), and therefore the legitimate activities of the State are confined entirely to (1) the enacting of administrative, civil and criminal law, (2) jurisdiction, (3) the care of minors and lunatics, and (4) the provision of the means necessary for maintaining the structure of the State (pp. 100–77). Conversely, the making of any provision for the common good (pp. 44 sqq.), and any attempt to influence education, religion or moral improvement (pp. 61 sqq.), are injurious.

Kant goes furthest of all in the limitations which he assigns to the purposes of the State. It is confined to realising the idea of Right or law (*Werke*, VI, p. 320 and VII, p. 130), and that realisation must be attained without

reference to the consequences of good or bad which follow [i.e. the idea of impersonal Right must be carried into effect regardless of its effect on the Good of persons], cf. vi, pp. 338, 446, viii, p. 150. Kant expressly attacks the idea of the 'welfare-State'—i.e. the State directed to the well-being of its members—unless such well-being or happiness be understood only to mean a condition in which the constitution is in the greatest possible harmony with the principles of Right, or unless, again, a law which [immediately] aims at some form of happiness (e.g. opulence) is only intended to serve [ultimately] as a means of securing a system of Right, especially against external enemies, cf. vi, pp. 330 sqq., viii, p. 156.

111. Cf. e.g. Locke, ii, c. 9, § 131 and c. 11, §§ 134 sqq., Wolff, *Instit.* § 74, Sieyès, i, p. 417, ii, pp. 309 sq. and 374 sqq., Kant, vi, p. 417, vii, p. 34.

Natural as opposed to civil rights

112. This theory [of a distinction between 'civil' and 'natural' rights] is already implied in advance by all the doctrines in which, from the Middle Ages onwards, the law of nature is exalted above the State, and it plays an important part in the thought of e.g. Althusius and Grotius. But it was only during the reaction against Hobbes' attempt to annihilate the idea of the natural rights of man that it was formulated as an explicit theory. Huber was particularly responsible for the development of a formal theory of the rights (of person, property, liberty of thought and freedom to follow the divine commands) which must be reserved in all forms of State for the individual, by means of the necessary articles in the contract [of government], and are thus removed from the control of the sovereign: cf. *De civ.* i, 2, cc. 9–5 and i, 3, c. 4. Pufendorf also reserves for the individual, as a man and as a citizen, natural rights which, though they are imperfectly protected as against the sovereign, are still indestructible. *Elem.* i, d. 12, § 6, *J. n. et g.* i, c. 1, cc. 8–9, *De off. hom. et civ.* ii, c. 5, c. 9, § 4, c. 11. Hertius argues in the same sense, *De mod. cont.* n. 1, § 6, and Schmauss devotes a detailed exposition to the theory, iii, c. 3 and v, c. 2, p. 1.

Thomasius on liberty of conscience

113. Cf. Thomasius, *Instit. jur. div.* i, c. 1, §§ 114 sqq. and *Fund.* i, c. 5, § 111 sqq., where a clear distinction is first drawn [before he comes to the particular question of liberty of conscience] (1) between *jus constitutum* and *jus constituendum*, and (2) between the 'subjective' side of any body of law [law or 'Right' as expressed in the rights of 'Subjects' or persons] and its objective side [law or 'right' as expressed externally in a concrete body of rules]. See also J. H. Boehmer, *P. spec.* i, c. 5 and iii, cc. 1–2, and Gundling, c. 1, §§ 51–62.

114. Locke, ii, c. 11; cf. also Sidney, ii, nn. 10 and 11 and iii, nn. 4 and 20. The same view appears in the French physiocrats.

Wolff on natural rights

115. The main object of Wolff's enquiries into the extent to which the original law of nature is either over-ridden by the contracts which form the State, or still continues to preserve its validity, is simply to attain a basis for dividing the rights and duties of political man into those which are acquired and those which are innate. The conclusion which he attains is that the individual retains the sovereignty he enjoyed in the state of nature, in regard to all actions which the political authority is not warranted by its purpose in regulating, but he also vindicates the inviolability of those 'acquired' rights which are so much bound up with man's being that he cannot be deprived of them. *Instit.* §§ 58 sqq., 980, *Jus nat.* i, §§ 26 sqq. and viii, §§ 35 and 47, *Pol.* §§ 215 and 439.

116. Cf. e.g. Daries, *P. spec.* §§ 710–46 (*pure materiale absolute*), Nettelbladt, §§ 145 sqq., 193 sqq., 1127, 1134–42 (there are *obligationes contractus* as well as *contractus*, and *pure consensus* as well as *quasi*), Achenwall, I, §§ 69–86, II, §§ 1 and 98–108, Kreittmayr, §§ 31 sqq., Schmidtmannel, III, pp. 171–343. See also Turgot, art. *Fondation*, § 6, p. 75 *les citoyens ont des droits et des devoirs sacrés pour le corps même de la société*. Compare also Blackstone, *Comm.* I, c. 1, pp. 124 sqq. [where Blackstone distinguishes 'absolute' rights from those which are 'social and relative'] *Views of theory of natural rights*

Montesquieu, it is true, assigns to the State the object of realising as far as possible the spiritual and economic liberty of the individual (cf. e.g. XII, cc. 1–18, XIII, cc. 12 and 14, XX, c. 8, XXIII, XXV, cc. 9–13), but in attacking slavery he merely uses the idea of the inalienability of liberty (XV, cc. 1–18). [In other words, he speaks of liberty as achieved by the State, but at the same time regards it as independent of the State.]

Justi also (§ 18) pronounces that government to be the best which limits 'natural liberty' as little as possible and yet succeeds in achieving the purpose of the State.

117. This is especially true of Sieyès, whose *Reconnaissance et exposition des droits de l'homme et citoyen*, of July 1789 (I, pp. 427 sqq.), forms the basis of the public Declaration of the Rights of Man (I, pp. 473 sqq.). Along with freedom, which the citizens bring with them as their inalienable right into the social state (II, pp. 3 sqq.), he makes property, 'that God of all legislation' (II, p. 35), inviolable by the State (cf. also II, pp. 374 sqq.).* In the present context, in which we are only concerned with the theoretical [and not with the historical] development, we need not reckon with the fact, on which Jellinek has remarked, that the American 'bills of rights' [e.g. the Virginia Bill of Rights, and the Pennsylvania 'Declaration of the Rights of the Inhabitants of the Commonwealth or State', of June and September, 1776] were anterior to the French Revolution of 1789 as constitutional assertions of the fundamental rights of individuals. *Droits de l'homme in 1789*

In Kant also the innate and inalienable rights of the individual—in the three senses of the liberty of man, the equality of subjects and the independence of the citizen—form the basis and the canon of all political life: *Werke*, VI, pp. 322 sqq. and 416 sqq. and VII, pp. 34 sqq., 147 sqq. A similar view is to be found in A. L. von Schlözer, pp. 51 sqq. Hoffbauer goes to the furthest length. He begins by developing a system of the absolute (or original), and the conditional (or acquired) rights, which belong to all rational existence (pp. 64 sqq.), he then proceeds to depict the absolute or original rights of man (pp. 111 sqq.), only after that does he arrive at man's conditional or acquired rights (pp. 120 sqq.). But even now he has first to discuss the 'universal', and then the 'particular', species of such rights, and afterwards, under the latter head, to treat of an 'extra-social' form, before he finally arrives at the 'social' form of the 'particular' species of 'conditional' rights [cf. n. 19 *supra* for this process of subdivision in *Justus*].

Möser attacks the conception of the rights of man (*Mus. Wrtmgr.*, I, pp. 306, 313, 335) but he definitely recognises in an earlier work (*Patriot. Phantas.* III, no. 62) the existence of free rights of the individual which are not forfeited in the social state.

* Reference may also be made to T. Paine's *Rights of Man*, Part I (of January, 1791).

The variations of Fichte's views

118. In this connection [i e as regards the passing of individualism into a system of social absolutism, and vice versa] the variations of opinion which Fichte could achieve without abandoning his theoretical basis are particularly significant In 1793 he regards the purpose of the State as consisting only in 'the cultivation of liberty' (*Works*, vi, p 101), in 1796, in speaking of 'the purpose of Right or law', he is already willing to think of an economic transformation of the State in conformity with the idea of Right, and in 1800 (iii, pp 387sqq) he even derives his socialistic State, directed to the general welfare, from the idea [Gierke here is referring to Fichte's *Der geschlossene Handelsstaat*, on which see W Wallace, *Lectures and Essays*, pp 427sqq] By 1804 he is expounding the purpose of the State into 'the purpose of the human race', which leads him to interpret it as being the promotion of general culture (vii, pp 144sqq), and in 1807 he depicts the ideal of an educational State (vii, pp 428sqq.) Later still, he attempts to reconcile this later purpose of education and moral development with the earlier purpose of 'the cultivation of liberty' (*Works*, iv, pp 367sqq , *Posthumous Works*, ii, pp 559–42)

Corresponding to the variations in his view of the State's function are the changes in his conception of the relation of the individual to society At first he emphasises the inalienable rights of man which cannot be diminished by any form of contract (*Works*, vi, pp 159–61) In his *Naturrecht* (1796–7) he argues vigorously, in opposition to Rousseau, that the individual is only merged into the organised whole in one part of his being and nature, but otherwise remains 'a completely free person, who is not woven into the whole of the body politic' [*Works*, iii, pp 304–6], and even in *Der geschlossene Handelsstaat* of 1800 he still maintains this point of view (iii, pp 387sqq) In his *Grundzüge der gegenwärtigen Zeitalters* (1804–5) he entirely alters his view the individual is now completely merged in the perfect State which ought to be the goal of endeavour He has nothing *per se* he has everything in virtue of being a member of the State, he is entirely the instrument of the State, and he is only sovereign 'in regard to his necessary purpose as a member of the race' [i e he is only sovereign in so far as he is part of a general humanity which is itself sovereign in determining the purposes of its life], cf vii, pp. 147sqq , 153, 157sqq , 210 He takes the same line in the *Reden an die deutsche Nation* (1807–8), but later still he adopts more of a *via media*, emphasising the 'moral liberty of the will' which is still left to the 'instrument' of which he had previously spoken (ii, pp 557sqq)

119 [Not only is individualism no bulwark against socialism and collectivism] on the contrary, it rather appears as if the elevation of the individual into the *summum quid* and the *summum ens* of social institutions were an inseparable element of socialistic and communistic systems.

Resignation of the social ideals in eighteenth-century thought

120 Leibniz approaches nearest to this way of thinking, in the introduction to his *Cod juris gent diplom* i, §§ 11–13. There are also statements in Ferguson (*J*, ch. 7–10) which make the social aim consist, not in the greatest possible amount of pleasure, but in the greatest possible amount of spiritual activity, and therefore in the free development of the powers both of the national community and of individuals cf also v, c. 5 Schmelzing too rises to the view (i, pp 75sqq) that there are certain natural basic rules for the attainment of the aim of the State, of which the greatest is that the well-being of the whole and the private well-being of the parts are to be simultaneously and jointly pursued by every individual and every society,

but that, where there is any clash, the well-being of the whole must be preferred

121. Horn accordingly makes a definite attack on theories of the original sovereignty of the people (10, c 1, § 18), of the existence of a 'real majority' [as distinct from 'personal'] (11, c 10, §§ 11–15), and of the possibility of a *subjective* sovereignty of majority (10, c 11, § 1) But he equally impugns the possibility of the popular community possessing *any* right whatsoever as against the Ruler (11, c 3, § 1)

122 Horn attempts to prove (10, c 10, § 2) that it is impossible for *plures* *superiores* to be the 'Subject' of majority When rule is ascribed to all or some in a democracy, it is *ipso facto* also attributed at the same time to all or *singuli*, and the result is that, since *imperium et dominium non inhabitant unum* *personam*, the existence of any 'Subject' at all is really denied If, on the other hand, it be admitted that *singuli* are simply *subditi*, it follows that no other quality than that of being a body of subjects can be predicated of *singuli* *conjunctim*, i e of all when they are regarded as united in a sovereign * Moreover [apart from the logical difficulty] there is a further difficulty, which is involved in the recognition of the majority-principle That recognition means either that *singuli* are deposed [in favour of a mere majority] or that the rulers are, in part [i e as regards the minority], turned into being the ruled, but in any case a sovereign which changes with each vote would be a monstrous sort of sovereign If we now turn from democracy to aristocracy, we find once more that there is no 'Subject' or owner of majority Here again, just as in democracy, a distinction has to be made between *unum* and *singuli*, though the two things thus distinguished are really one and indistinguishable. For if *singuli* have nothing, *unum* equally have nothing, and if *unum* have authority, *singuli* equally have a part of that authority, and the result [on the latter supposition] is that each member of the ruling class will have a *particula majestatis* which, like the whole of which it is a part, will be *summa*, and thus a number of *summa imperia* will arise Horn then argues, in § 3, that it is no less impossible for *unum* or *plures* to possess 'majority' severally (*disjunctim*) than it is for them to possess it jointly (*conjunctim*)

Horn's attack on any form of plural sovereignty

123 Cf 10, c 10, and supra, n 96 to this section

124 Pufendorf (*J n n g* VII, c 3, § 5) delivers a vigorous attack on the 'sophistical' arguments of Horn, objecting to him that, at any rate in *moribus*, the whole can possess attributes which no part possesses, and arguing accordingly that, *in corporibus moralibus compositis, aliquid totum potest numerare quod nequaquam omnibus* (i e *singulis eorum simul*) *neque uni alicui ex illis singulis quos totum, adeoque summarum rerum et personarum moralis a singulis distincta, est proprietas solutissima, ortumque et jura totius quoad, quae in singulis non inesse*

Critics of Horn's name

125 Spinoza agrees entirely with Hobbes in thinking that a social body controlled by a single mind (*ut scilicet mentes et corpora sese quasi unum unamque corpus componant*) can come into existence through the vesting of all power in the Ruler, in virtue of a transference of their power by all individuals, so that the Ruler, *qua* Ruler, henceforth represents the will of every individual Cuilibet volenti pro omnium voluntate licebunt ea et quae

The Ruler as representing the Group

* Cf the argument of Hobbes, supra n 155 to § 14.

Civitas quidem et homines non desunt, desiderantur ab unoquoque dominum sua conservatione cf *Eth* IV, prop 18 schol., *Tract pol* c 2, ¶15, c 3, §§1–5, c 4, §§1–9

Mevius (*Prodromus*, v, §§23–6) similarly holds that the unio, by virtue of which the State is una velut *persona* (*sic ut unus, unus senatus, unus rebellis, et omnes inter multos velut unus atque idem*), is based on the submission of all wills to that of the Ruler, whence it follows that *repraesentat totum multitudinem repraesentant et quae non sunt*—their action counting as the action of the 'whole community and of all severally', and the 'will and judgment of the Rulers being the will and judgment of the whole society or State' See also Hourtynus, *Pol gen* §99, no 14, Micraelius, 3, c 10, §§14–17, Bossuet, 1, a 3, prop. 1–6, vi, a 1, prop 8–9

126 Cf *Tract theol-pol* c 16 (*coetus unanimes homines, qui collegialiter rationem pro ad omnes, quae potest, habet*), *Tract pol* cc 3, 6 (*ut jus, quod unusquisque ex natura habet, collectum habeatur*), *Eth* IV, prop. 18 schol.

127 E g the one conclusion that emerges in Bossuet (v, a 1) is nothing more than the dictum, so often quoted since, that the monarch is l'État même

128 Huber, *De jure civ* 1, 3, c 4, §§8–83, II, 3, c 7, §35 see also, on the validity of the majority-principle, which is referred to an original act of agreement, 1, 2, c 3, §§27–29, II, 3, c 1, §§21–2 and c 2, §§3–5

129 Ibid 1, 3, c 2, §14, c 6, §26, 1, 9, c 5, §§51 and 69–72, II, 3, c 6, §2

130 Ibid II, 3, c 6, §§1–10

Pufendorf on corpora moralia as created by consent

131 Cf *Elem* I, def 4, §13, *J n et g* 1, c 1, §13 *personae morales conjunctae constituuntur, quando plures individui humani sic inter se consentiunt, ut quod in ultimo omnes voluerint aut agant pro una voluntate unaque actione, non pro pluribus consentire* Therefore, he argues, not only is a *pactum unionis* necessary in order to produce, first of all, the State (*J n et g* VII, c 2, §6), a similar *pactum singulorum cum singulis*, to the effect that certain things shall be managed jointly and in the interest of one *persona moralis*, is also indispensable for families, corporations and local groups (*Elem* II, d 12, §26) In another passage, where he distinguishes between *corpora naturalia*, *aggregatio* and *moralia*, Pufendorf repeats his view that a *corpus morale*, which remains identical in spite of all the changes of its parts, may be produced by a simple *conjunctio hominum* (*J n et g* VIII, c 12, §7) [In other words, a moral body may already exist in virtue of *conjunctio*, before any further step has been taken, such as the appointment of a representative organ to act on its behalf]

Pufendorf on the conditions of real Group-personality

132 Cf *Elem* I, d 4, §3, *J n et g* 1, c 1, §13 *Idque hoc fere intelligitur, quando singuli voluntatem suam voluerint unus homines aut concilii sic subjecerint, ut pro omnium voluntate et actione valeat agnoscere et ab alter habere, quicquid ex decreto aut generali certa alia, quae ad omnes ejus sectatores in talem specialem et fere quodam congruam, modo est, quod cum alias, sit plures quod voluerunt aut agerent, tot voluntates et actiones etiam intelligantur, quae numero personae physicae sive individua hominum sic numerantur, in personam totum compositum coalitae una voluntate tribuatur, et quae ab illo ut habitus proficiscitur actio, una censeatur, unat plura individua physica ad unum concurrunt* He adds that under these conditions [i e where there is a moral body acting corporately through a representative] corporate property comes into existence, which does not belong to singuli, and other similar developments follow. See also *J n et g* VII, c 2, §5, *De off hom et civ* II, c 6, §§5–6 *nam multorum hominum voluntatis nulla alia natura fingitur, quam et unusquisque suam voluntatem voluerit unus homines aut unus concilii subjecit, ita ut denuoque pro voluntate omnium et singulorum sit habendum, quicquid de rebus ad incertitudinem communem accidentibus valuerit* Pufendorf argues, on this basis,

that a Group-person never arises from a simple contract of union, it must always be called into being by a number of contracts (*necessarium est, ut relationes utriusque sese mutuaret interpenetrabiles fiant*), which find their culmination in the contract of subjection, cf *J n et g* vii, c 2, §6. It follows that a *Systema Civitatis* [i e a confederation], being a *mera societas*, and not having erected any *superius*, is not a 'person' [since there is no man, or body of men, with authority to represent it], and cannot act by majority-decision cf *J. n et g* vii, c 5, §20

[In brief, the argument is that while simple *societas* can produce a 'moral body' (see the end of the preceding note), and while such *societas* may thus be the first step in constituting a 'moral person', there is something more needed before a real 'moral person' can emerge That something more is the creation of a representative organ, and submission thereto, for only in the 'person' of the representative organ can the 'person' of the *corpus morale* really exist and function.]

183 The doctrine of *entia moralia* already occurs, in essence, in *Elem* i, d 1199 [of the year 1660], but it is developed further in *J n et g* i, cc 1–2 [of the year 1672]

184 *J n et g.* i, c 1, §3 They are mere *modi*, which do not come into existence, like *entia physica*, through 'creation', but through 'imposition' i e they are 'superadded' to something already in existence They have no power of producing physical changes, and the only effect they produce is on the mind, by making men understand better the nature of their actions (§4) Just as they only come into existence by 'imposition', so they may be changed, or even abolished, by some alteration of such 'imposition' (whether by God or men), but the sort of change to which they are thus subject is one by which *ipsa persuasiones aut rerum substantiae physicae* is not affected (§23). *Pufendorf's theory of entia moralia*

185 Ibid §§5–6 Pufendorf prefers the twofold classification of 'moral entities' under these categories [of substance and attribute] to the simple classification which we should have to adopt if we confined ourselves to the idea that all *entia moralia*, being *modi*, are attributes of *homines*, *actiones* or *res* *Some are substances some only attributes*

186. Pufendorf begins by arguing that in the moral world *status*, as the basis of the existence of 'moral persons', corresponds to what *spatium* is in the physical world as the basis of the existence of physical persons in place and time * He admits some difference *spatium* can continue to exist after the disappearance of all natural objects, but *status* is inconceivable after the disappearance of the persons who exist in that medium (loc cit §§6–10) *Moral persons fully substances*

Having drawn this analogy [between the basis of existence of moral and that of physical persons], Pufendorf proceeds to interpret 'moral persons' themselves in the light of the analogy of physical substances (§§12–15) [But while he thus interprets *persona* as being moral in a way analogous to that in which substances are physical], he thinks it unnecessary ever to interpret *objecta* (*res*) as being 'moral' in this sort of way, since the attributes of objects (e g that they are 'sacred') can be referred on a deeper analysis to an *obligatio hominum* (§16) † Other *entia moralia* [i e moral entities other than

* Pufendorf's *spatium* is 'time-space' it is both temporal and spatial extent

† We need not regard a thing, such as a sanctuary, as being an *ens moralis*, on the ground that it has the attribute of being sacred, and that there must be an *ens* as the substance which carries this attribute Really, the attribute of being sacred can be reduced, if we turn from the thing to the men behind the thing, to an obligation of men to regard the thing as sacred

personae] are not *ad analogiam substantiarum concretae* they are simply mode, or attributes, of a purely 'formal' character (§17) They exist, that is to say, either as 'qualities' (e g a 'title', or a 'power', or a 'right', or an 'obligation', are all qualities, §§18–21), or as 'quantities' (e g 'price', or 'credit', or the value of a business, are all quantities, §22)

Moral persons simple or compound

187. Loc cit §12: *Extra moralis, quae ad analogiam substantiarum concretarum, distinctae personae moralis, quae non homines tantum sed jet coactum morale in unum systema cernunt, considerari cum status suo sui mutare, in quo in vita concinere soleant Sunt autem personae morales aut simplices aut compositae.*

Simple moral persons

188. Loc cit §12 The *persona moralis simplex* is therefore either *publica* (whether such 'person' be *principalis*, or *magis principalis*, or *representativa*), or *privata* (according to profession, civic status, family standing, descent, sex and age) The *ens morale* can never be a *qualitas physica* if a plebeian becomes a noble, or vice versa, no physical change is involved, and the Catholic doctrine of an 'indelible moral character' is therefore absurd (§29) [See n 139 supra, on the 'imposition', and the consequent possibility of removal, of the *status*—the attribute or character—which constitutes 'moral being'. It follows, on this argument, that 'imposition' makes the 'character', or *ens morale*, of a priest, and what has been 'imposed' can be removed Holy orders, therefore, are not 'an indelible moral character', to argue in that sense is to treat such orders as a 'physical quality' which cannot be altered]

189 Loc cit §14 (the individual may 'bear' a number of 'persons' because he has a number of 'positions' (*status*) which do not conflict)

140 Loc. cit §13 cf supra, n 139

141 Loc cit §15 here we see that the *existence* of an *ens morale* is not independent of every quality of the object Caligula could make a fool into a senator, but not his horse

Pufendorf also rejects the personification of inanimate objects which Hobbes achieves in c 16 of the *Leviathan* [e g of a bridge on which there is a right of charging tolls] as an unnecessary fiction—*cum supplissimum dicatur, a contrahentibus aequitatem eorum collegendi vehitur ratio relaxandi detinentur, et quae ex aliorum commodo actionem percipiunt aut exspectant*

Nature of compound moral persons

149 Cf *Elem.* 1, d. 4, §3, *J n ad g* 1, c 1, §13, vii, c 2, §6 It follows that *personae morales compositae* are not able *aequa ac tales obligare*, any more than simple persons are able to do so Their decisions only bind *membra sociata quia regula, aequaquam autem secundum quam qua talem* The contract for the foundation [of the society, as a 'compound moral person'] is not a cast to the contrary the society does not 'oblige itself' in any way even by that act, all that happens is that 'the members severally, as such, bind one another mutually, to the effect that they are willing to coalesce in a single body' If an individual afterwards gives a vote, he too does not oblige himself directly thereby, it is only indirectly that he does so—i e in so far as he helps [by that vote] to form the will which under the *pactum fundamentale* is binding upon him. Cf. *Elem* 1, d 12, §17

148 Pufendorf himself often uses the expression *personae physicae* instead of *personae morales simplices* cf *J n ad g* 1, c 1, §13, vii, c 2, §6 and c 3, §8

Such persons not natural, but created by agreement

144 Pufendorf expressly urges that 'naturally' a *societas omnium* subsistence in *unum* is impossible, and that a common will can only arise [by something more than a natural process, i e] by a *mutuo translatio* substitution, whereby *illud quasi nulla consulter, quod ut eium contulit, [aequa ac] in ejus solit.* In the same way the union of the powers of individuals [as distinct from their

will] does not come to pass naturally, but as a result of promises of obedience and the giving of guarantees for the fulfilment of those promises cf *J n. et g* VII, c. 2, §5 and *De off hom et cit* II, c 6, §§5–6, and see also, as regards the impossibility of *status naturalis* and the nature of *status moralis*, Otto's commentary on the latter passage Pufendorf accordingly goes so far as to commend the comparison drawn by Hobbes between the State and an 'artificial man', *J n. et g* loc cit §13 and *De off hom et cit* loc. cit §10

146 *Elem* I, d. 12, §27, *J n et g* VII, c 2, §§15–19 and c 5, §6, *De off hom et cit* II, c 6, §12 Such an agreement [establishing the validity of majority-decisions] is always to be presumed, in Pufendorf's view, because there is no better way than majority-decision of arriving at a united expression of will by an assembly He admits that any individual, on entering a society, may reserve for himself a right of giving or withholding his assent [to a majority-decision] on any issue, but he argues that, even in that event, the mere presence of such an individual does not affect the decision of the assembly adversely, for though the decision will not be binding upon him *ex suo consensu*, it will still be binding *ex generali lege et contractu non commodum praebent et ut pars se conformet ad hominem totum* *Even their majority-decisions depend on a prior agreement*

146 *J n et g* VII, c 2, §§13–14, *De off hom et cit* II, c 6, §§10–11 The commentators—Titius, Otto, Trauer and Hertius—expressly censure Pufendorf for taking over from Hobbes, in these passages, the identification of the *Imperator* with the *Contor* cf also Titius, *Observ* 157

147 Pufendorf accordingly describes the sovereign *Concilium* in a republic as a *persona moralis composita* or *coniuncta* *Elem* I, d 12, §27, *J n et g* VII, c 2, §15, c 5, §5, *De off hom et cit* II, c 6, §4

148. Hert, for example, emphasises the fact that what is 'physically' impossible is sometimes 'morally' possible, and what is monstrous *in physicis* may be unexceptionable *in moralibus* e g on a *consideratio physica* a plurality of men cannot be one, nor one man a plurality, but on a *considerato moralis* a number of men may be taken together as a single person, or one man may be taken to be several persons In the realm of nature a single head with a number of bodies, or a single body with a number of heads, is a monstrum, but this is by no means true of moral bodies Cf *Annot ad Pufend J n et g* I, c 1, §3 n 4 and *Opusc* I, 3, pp 27–29 and II, 3, pp 41–139 *Hert modifies Pufendorf*

149 Thomasius defines a *persona* as *homo considerato cum suo statu* He distinguishes between the *persona simplex*, *sive unicum individuum humanum*, and the *persona composita sive plurium individuorum certo statu iuncta* (*Instit jur div* I, c 1, §§86–7), and he defines the State as a *persona moralis composita* (*ibid* III, c 6, §§62–3) Titius regards jurisprudence as almost exclusively concerned with *personae morales*, which are either *singulares* or *compositae* (*Observ* 54, *Jus pers. Rom Germ* VIII, c 2) Cf also Ickstatt (*Opusc* 10, op I, c 1, §§14–15), who regards *persona moralis simplex* and *persona moralis composita* as distinct, exactly like Pufendorf *Thomasius minus his theory*

150 Hert, *Opusc* I, 1, pp. 286 and 288, II, 3, pp 41 and 55, Gundling, *Jur nat* c. 33, §34, c 37, §§9–10, and *Exerc* 18, §3 (*personae mysticae nulla subsunt, ac moralis comparandae dicuntur*), Schauer, I, c 3, nos 69–70, and also Beumann, c. 12, §7

151 Nettelbladt (*Syst nat* §83) can still remark incidentally that 'physical persons' are also called 'single' (*singulares*), and 'moral persons' also go by the name of 'composite' or 'mystical', but he himself only uses the expression 'moral persons' Cf also Schedemantel, III, p 244.

152 Cf. e.g. J. H. Boehmer, *P. spec.* 1, c. 2, §1, c. 3, §1 n. *a*, Heineccius, *Elem.* II, §90, Achenwall, *Prolog.* §§91–3, II, §§9 and 15, Hoffbauer, pp. 190, 244, 297, 310.

Leibniz adopts the terms *persona naturalis* and *persona civilis* in his terminology, but he also uses the adjectives *naturalis* or *facta* as synonymous with *civilis*. *Nouv. essais* II, §16, Introd. to the *Cod. jur. gent.* 1, §22; *Causa Dei* c. 17, *Spec. demonstr. fol. pr.* 1 and 37.

Wolff also follows Pufendorf in part

153. In the theory of Wolff (*Instit.* §96) man is a *persona moralis* or *civilis*. *Person* in so far as he is regarded as the 'Subject' or owner of rights or obligations, and is thus in a *moralis status* or *civilis Zustand*, cf. also §§850, 969, 1050.

Darjes (*Prolegg.* §§9, 14) holds that by 'person in the juridical sense', or 'moral person', we mean man 'in so far as he has a certain moral status'—*or per transfertur ad a personalitate ut in statum physico ad personalitatem moralem non salvo corporalitatem.*

Collective and representative unity

154. Thus Treuer, in a note to Pufendorf's *De off. hom. et cit.* II, c. 6, §5, holds that a 'union of wills' is possible by means of mere *societas et foedera*, without *imperium*—though a union by means of *imperium* is better.

Thomasius interprets the personality of the State in exactly the same way as Pufendorf (*Instit. jur. div.* III, c. 6, §§27, 31, 62–4, 157, *Fund.* III, c. 6, §7), but after including the State in the category of *societas mixta*, which blend the principle of Fellowship with that of Rulership, he proceeds to add to these 'mixed societies' two other forms of society—the *societas imperii* of God and man, which rests on the pure principle of Rulership, and the *societas aequalis*, which rests on the pure principle of Fellowship (*Instit. jur. div.* I, c. 1, §§91–113, III, c. 1, §§57–74).

Titius ascribes the unity of the personality of the State entirely to the representation of all its members by the Ruler, who has thus a double personality, while the subject only possesses a single personality (*Spec. jur. publ.* I, c. 1, §§43 sqq., VII, c. 3, §§19 sqq.), but in dealing with the *imperator*, which he relegates altogether to the sphere of private law, he assumes the existence of a purely Collective *persona moralis composita* (*Observ.* 94, *Jur. pro Rem.-Germ.* VIII, c. 2).

155 *De mod. cont.* n. 1, §§2–3 (*Opusc.* I, 1, pp. 286–8), cf. also *Elem.* 1, n. 3.

Hert's view that group-unity involves a Representative

156. Cf. *Opusc.* I, 1, p. 288 (*Quod enim de universitate dicitur, eam ne omnem nec individuam habere, non quatenus sic dici facere, hoc dicimus esse, quoniam universitas pars sit hominum contentus et quasquam juris operatione habet, accepto consensu vel expresso vel tacito omnibus summa potestatis,* * *atque hactenus persona sit mystica, non et praecipuis juris personae nomen retineat; neque dubium est, quin hoc expressis contrahere et delinquere possint*). Hert accordingly ascribes an absolute representative authority to the *Rector Civitatis* [the Head of the State], but he will only allow to the *Rector Universitatis* [the Head of a corporation] such representative authority as comes within the limits of the powers granted to him by the sovereign (note 5 to Pufend. *J. n. et g.* VII, c. 2, §§12, and *Opusc.* II, 3, p. 55).

157. *Opusc.* I, 3, pp. 27–44.

158. Ibid. II, 3, pp. 41–7.

His theory of one man with many 'persons'

159. In his treatment of the first set of cases [those in which one man sustains several persons], Hert begins by considering the possibility of the same

* 'By the consensus of those who are in control (*compotes sunt*) of the supreme power.'

individual being reckoned, upon a considerate morality, as being several different persons in his different capacities (sect. 1, §§1–2). He proceeds to lay down some legume general rules for such contingencies (sect. 1, §§3–7). He then discusses, as cases which come under these rules, (1) the unions [in one man] of various rights of status which have their basis in the Family and the State (sect. 2), (2) the different capacities enjoyed simultaneously by the Emperor, and by the Estates, in the German Empire (sect. 4), and (3) the conjunction of a number of different powers [in the same individual] in the domain of private law (sect. 4).

160. In treating the second set of cases [those in which several men sustain one person], Hert begins by attempting to prove the possibility of several men uniting to form a single *persona moralis*. There are three sorts of *unum*—the *unum per se*, the *unum per accidens* and the *unum per aggregationem*—according as it is a 'natural', an 'artificial', or a 'moral' bond which unites the parts in question. A 'moral body' is brought into being by a 'moral bond', *quo per constitutum hominum diversa individua sic colligantur, ut unum esse intelligantur* (*Proleg.* §§1–2). He proceeds to suggest general rules for collective persons [of this moral order]. Either a *senatus deputatus* or a *senatus reserus* may be the basis (§3); the Group-person may come to possess capacities and rights (e.g. of legislation, or the power of life and death) which belong to none of the single persons so grouped (§4); the associated continue to retain each *suprema singuli* (§5); the rights and duties of the collective person are not *singulorum non per consequentiam* (§6). *His theory of several men such one 'person'*

Hert then distinguishes two 'sources' of this 'unity of persons' [in a moral body]. The one is '*Lex fingit*', the other is '*Consensus hominum effingit*'. Under the first head—that of the feigned unity of persons (sect. 1)—he treats of *patrifamilias et filius* (§§1–7), of *dominus et herus* (§§8–16), of *dominus et servitius pecus* (§17), of *jus repraesentationis* (§18) and of *Curator et Curatus* (§19). Under the second head—that of contractual unity of persons (sect. 2)—he deals with *societatum* (§§1–3), *conlat.* (§§4–8), *universitas* (§§9–11), *corpus delicti et crimen* (§§12–15), and *simili feudum subinfeudum habeatur* with feoffees (§16).

161. *Jus nat.* c. 5, §50 (*in superio statu superiorem sibi mere constituit, sin subjecti non servat mutis, sed superiori spiritui, nemo obligandis superioribus superiorem sunt*), c. 35, §30 (*magistratus subditos sit subditus universorum et singulorum*), c. 37, §§2–3 and *Doc.* c. 94. The *persona moralis* are equally only appears, therefore, in Gundling's theory of the State when he is speaking of a republic. *Jus nat.* c. 35, §34, c. 37, §§3–10. *Gundling holds that the State needs a representative*

162. *Dissert. de universitate delinquente*, §§1–5. A *universitas* is only a 'multitude' united by 'consent'; the object of such consent is *ut idem conducat*, *ut idem intelligere et velle consentiat*; from consent directed to that object *resultat unitas, cujus ratione personae mysticae unus evadunt, ac moralem compositionem dicuntur*. *He makes a corporation only a collective unit*

163. Loc. cit. §§6–8. *A fictio juris* is in no way necessary to explain the Group-person. We can see for ourselves how a unity like that of an individual man comes into existence through the union of the wills of a number of men. It does not matter if it is only with the intellect, and not by sense-perception, that we realise the union of the Many in the One, and the distinction of the One from the Many. If it did matter [i.e. if sense-perception were a necessity], all *res incorporales* would be imaginary, and only what we see or hear or smell or feel or taste would be real, and that is absurd, for since there is *His rejection of the theory of fiction*

no *dissentiente* without mutu *dissentio*, and no truth without demonstration, we should be driven to saying that truth itself is untrue. Nor is a *fictio* necessary to explain the assumption of a common *universitas*, for although a *universitas* *constituta* is not easy to attain, it none the less follows from the nature of a *universitas* (*nisi* it *constet*, but *cessat* continue to exist without mutuus, and must therefore necessarily choose *modus solendi aut solendi pluribus* in order that it may act itself as *universitas*) that 'the will of the major part should count as the will of the whole person constituted by a number of men'

Gundling, however, admits that *universitates certis casibus originaliter sunt quae partes constituentes quibus illibatum sua vita originaliter manet*. They are not created by nature, but by reflection and will

His assistance on the collective principle

164 We must note, it is true, Gundling's contention (loc. cit. §§ 19–48) that a *universitas* may even be guilty of delict and suffer penalties accordingly But it is also to be noted, first that such delict can only be committed (in his view) by the common action of all, and not by a majority or by the body of managers, and secondly that a *universitas* may also commit murder or similar crimes, while, as for the penalties of delict, it is only the guilty persons (either taken together or severally) who are affected by them, and the abolition of the corporation as such is not regarded as a possible penalty

165 This distinction appears in Kestner, c 7, §3 (cf also Herr, *supra* p 102) and in Schmier, 1, c 3, n, c 3, 4, 1, §§1–3, v, c 1, nos 87sqq and c 2, nos 52sqq

Backner as equal and unequal society

166. According to J H Boehmer, a *societas* contra a *conspiratio plurium personarum mutuum inter se ad certum finem* it constitutes a 'moral body', and the greater of that body is a union of the wills of all, in one will, such that *conjunctim considerari usum in moralibus repraesentat personam* In an 'equal society', thus 'union of wills' is based upon 'simple obligations', but just for that reason it remains imperfect In an 'unequal society'—though the ground or basis is still an 'association of equals'—the factors of *superiorum* and *subjecto* are superimposed, by the 'submission of all wills to the single will of one man or of a whole council', with the result that *solutior omnium in subiectis hujus sic constituitur, ut quod superiores summo in regimine ad finem civitatis spectantibus vult, omnes velle moraliter censentur* (Cf *Jus publ univ* P *gen* c 2, §4 n *f*, P *spec* 1, c 2, §§1–18, c 3, §1 n 1, §§15–21)

167 Cf Heineccius, *Elem* n, §§113, 115, Mullerus, 1, c 1, Wolff, *Jenis* §839, Nettelbladt, *Syst nat* §§354–61, Achenwall, n, §§20–39, Darios, *Prolegom*, §§17–23, P *spec* 550sqq , Hoffbauer, pp 194, 199sqq , 205sqq

The State as an unequal society

168 This view explains why the State, as a *societas perfectissima*, was regarded as beginning in existence with the substitution of an 'unequal society' for the original 'equal society' (which is sharply distinguished from 'democracy' (Boehmer, 1, c 2, §§6–12), and occasionally even described as 'anarchy' (Darios, §§651sqq)), when the imperfections of this equal society began to make themselves felt It was often urged, too, in the strength of this view, that unity was more perfect in a monarchy than in a republic, where the Ruler in his nature reflected and represented an 'equal society'

Corporations as equal societies

169 The family system of government was generally the only 'unequal society' which was recognised, other than the State, and all corporations, including the Church, were interpreted as being 'equal societies', cf § 18, infra [on the natural-law theory of corporations].

Difference of monarchy and republic

170 This is the reason why we often find the conception of the *persona moralis unitas* treated as entirely irrelevant in regard to monarchy, and only

applied to republics cf Gundling, in n 161 supra Ickstatt expressly says that in a monarchy, where the king represents the whole State and all its members, *totus Respublicae intellectus atque solutus in intellectum et solutionem personae moralis simplicis resolvitur*; whereas 'Polyarchy', or the government of Many, involves a *persona moralis composita* *Opusc* II, *op* 1, c. 1, §§ 14–16 and 66.

171 Thus J H Boehmer applies the conception of the *persona moralis* of the State only in the sphere of international law *P. gen* c. 2, §§ 3–7, *P spec* 1, c 3, § 23

172 We have already noticed, in n 160 above, the lengths to which Hert was prepared to go in this direction

173 Like Pufendorf and Hert (supra, n 139 and nn 157–60), Nettelbladt, in his *Syst nat* §§ 80 and 1194 and *Syst pos* § 16, and C von Schlozer, in the *De jure naturae*, § 11, both draw this parallel

174 Hennecius allows that every 'society', including the State, is only the result of *consensus diversae plurium in unum finem coalitque mentis, quae ad finem illum obtinendum tend necessaria*, but he also holds that—in view of the fact that 'one will and one mind' arise, either through *conspiratio* or *unum* or through *subiectio* or *unum obsequium* to the will of a Ruler—*omnes societates sunt unae personae morales*, and possesses, as such, like duties, rights, and even 'affections' (e g life, sickness and death) with the individual Accordingly, he argues, every society confronts not only other societies and individuals, but also its own men, as a distinct 'Subject' or owner of rights (*Elem* II, §§ 13–25, 115) *Hennecius on the unity of a society*

175 Wolff's general theory of societies (*Instit* §§ 936–53) is based throughout on the idea of a contract directed to the attainment of common ends by common means, and it is from this contract that he derives the whole system of law, and of rights and duties, which regulates the internal life of corporations—including the authority which 'all taken together' [*alles zusammen*] exercise over 'individuals' It is only in its external relations, he holds, that 'each society, because its members act with united forces, appears as a single person', and it is particularly in this sphere (of their external relations to one another) that 'a number of different societies are to be viewed as if they were so many free individual persons' Wolff thus finds no difficulty in describing a 'moral person' as the owner in any case of joint property where a number of persons are each deemed to have a share, since in such a case that 'number of persons, taken together, are treated as a single person, and what is true of an individual owner is true of them when taken together' (§ 196) [Not only does he thus recognise the simple 'moral person' he also recognises compound 'moral persons'] He treats the Family as being a *societas composita*, because the members of which it is composed are not mere 'physical individuals', as they are in a 'simple society', but are 'whole societies which are treated as single moral persons', i e the society of husband and wife, the society of father and child, and the society of master and servant (§ 977) *Wolff's theory of Groups*

On the other hand [and while he thus recognises a variety of moral persons], Wolff regards even the moral personality of the State itself as nothing more than 'the whole community', in the sense of the sum total of all individuals, including the Ruler (§ 1030), and the result is, that while he thinks that international law can be based on the character of States as 'free persons living in a natural state' (§§ 977 and 1088), he never mentions the State as a person in dealing with its system of [internal] public law

Darey' scheme of associations

176 Darey begins by constructing a comprehensive scheme of *jus sociale* or *potestas* on the basis of a conception of *societas* which makes it a *status per quem personae in personam conspiratae per perfectam aliqua affirmatione*—or, in other words, a condition which involves a nexus of legal relations by which individuals are either connected with one another by equal rights and duties, or are set over against one another as rulers and ruled (§§317–61). On this basis he proceeds to interpret all societies, up to and including 'civil society' or the State (§§362–399). In dealing with the State, he distinguishes the two sorts of nexus between its members—the nexus between the *imperans* and his subjects, and that of the subjects with one another (§§661)—but he makes the *imperans* the one and only 'Subject' of [political] rights (§§693–699). He applies the conception of the 'moral person' only in regard to the external relations of a group [and not in regard to its inward unity]. Cf. *Prolegg.* §94, *plures homines, quibus ut communis aliquod attribuatur consensus sunt jura, et sic subinque status moralis nomen aliquo ubi eiusmodi personam moralem constituunt.*

Nettelbladt's theory of associations

177 Nettelbladt lays the foundation [for his general view of associations] in his theory of *jurisprudentia naturalis generalis societatis* (as stated in his *Syst. nat.* §§362–414). In expounding this theory he starts from the definition of *societas* as a *conjunctio plurium hominum ad eundem finem conjunctis viribus obtinendum*, and then proceeds to develop in advance all the conceptions by the aid of which he afterwards explains the rights and duties of Family, Corporation, Church and State.

178 This is especially the case [i.e. Nettelbladt is forced to set the whole over against individuals] in regard to the 'equal society' which possesses *potestas*, for here authority over the individual seat is ascribed to the *societas ipsa*, and not, as in an 'unequal society', to an *imperans*, or, as in societies without *potestas*, to an *arbiter* (§§335–46 and 355–6). But Nettelbladt hastens to add that *societas* is to be understood, in such a case, as signifying only *coetus seu moral rempublicae*.

179 Cf. *Syst. nat.* §§83–6, 389–90, 335, and *Syst. pos.* §§17 and 865. Nettelbladt does not seek to invoke the idea of a 'fictum' in this connection. He prefers to think that *non omnia entia intellectu, intuitu et tempore sunt in eadem satisfactio, non solutio et ens sui, sunque ab ens homine non sunt in corporum regnum differunt, quae differentia hic non est attendenda* (§84). He also argues that while the conceptions of birth and death are not applicable to such a person, its origin may be compared to birth and its dissolution to death (§85). But he always identifies the 'moral person' with *plures individua homines unum corpus* (§89), and thus he says of the State, *Cum dicuntur Respublicae unum corpus personae moralis esse, quae est ipsa Respublica* (*Syst. nat.* §1192; cf. §§1152–9, 1200, 1403–399).

Achenwall's theory of associations

180 Cf. *Prolegg.* §§92–3: *a societas, ut a corpus, consideratur generatim, abstrahendo omnia ab ut quae lex ut illud singulum quae sunt omnium conveniunt, ipsiusque aequat ratio tamquam sui ipsius.* Since it is a whole of which the parts are men, it has the same natural rights and duties as each of its members, except in so far as the 'very nature of society' constitutes a difference. It is therefore a person, though it is called a 'moral' or a 'mystical person', or a 'moral' or a 'mystical body', to distinguish it from the individual, who is a 'single person', and the whole system of the natural rights and duties of individuals is accordingly applicable to it, except in so far as *diversa hominum indoles et societatis natura* makes modifications necessary. These modifications are then developed in §§16–61.

Achenwall's individualism

181. Note, in this connection [i.e. as showing the individualistic basis of Achenwall's thought], the account which he gives, in developing his theory of *status et pactum* (II, §§ 2–46), of *jus mutuum* or *internum* (ibid. §§5–13). He always interprets this *jus* as consisting in the reciprocal rights and duties which belong to individuals as such—i.e. the rights and duties which spring from their 'social juridical nexus', and are thus to be distinguished from their rights and duties as *homines*, though if more than two members are concerned [so that it is a case not of *A* versus *B*, but of *A* + *B* etc. versus *C*], he regards the sum of reciprocal rights and duties as involving a *jus mutuum* or *singulorum singulis singulis in universum*. On this basis, in an 'equal society' in which the 'right and obligation of all' are the same, there is no internal unity of the group transcending the aggregate of *universi*, and the *solarium societatis qua unus personae* is thus identical with the *contractus societatis universi* (II, §§28–31). In an 'unequal society', on the other hand, there is added to the collective unity [i.e. the unity of the aggregate of *universi*], which also exists in such a society [just as it does in an 'equal society'], the further factor of representation of all, to a greater or less degree, by the *imperium* (II, §§32–9).

He reduces Grotius to collective bodies

182. Already in his *Prolegomena* (§92) we find Achenwall contending that the conception of the 'moral person' can only be applied to any society *respectu non-nationes*, and that it is therefore limited to 'particular societies' (It cannot apply to the 'universal society of all men',* the existence of which is supposed in *Prolog.* §§89–90 and in I, §§43–4.) Accordingly, he only introduces the 'moral person' into his general theory of society when he is dealing with *extrinsecum jus sociale* (II, §§ 14–22), cf. the dictum in § 15, *quam saepe conjunctae sunt ut stipulantem fiunt agent, eique idem jus et obligationes sunt ac si fuerit ipsum qui conjunctae quae commune sint, neutiquam ut personae morales et ab extrinsecus tamquam solus spectari debent et possint.* While holding this merely Collective conception, he finds no difficulty in regarding the Family—with its three relationships of husband and wife, parents and children, master and servant—as a 'compound society' whose members are 'mystical' and not 'individual' persons (*Prolog.* §94, II, §§78 sqq.)

Subordinate has some idea of a Group-person

183. He says of the State (I, pp. 91 sqq.) that from the union of the powers and wills [of individuals] with the commands of its Head 'there arises a Whole, a composite being independent of other societies, which evinces itself in action determined by its own understanding and will, and is therefore capable of having rights and obligations—in other words, a civil society, a people.' In the same way he describes societies other than the State as 'composite persons' (III, pp. 144 sqq.). See also I, pp. 84 and 157 sqq., III, pp. 408 sqq., and n. 120 *supra*.

The basis of the rights of majorities on the old view

184. This had been the theory adopted—after Grotius had set the example (see n. 74 to § 14)—by Pufendorf (n. 145 to this section), Thomasius (*Justitia jur. div.* III, c. 6, §64), Gundling (n. 169 to this section), Wolff (*Jurisp.* §§841–5, where it is argued that by the nature of society all must concur in an agreement that the will of the majority shall be regarded as being the will of all), and Neuchlaub (§388, where the majority-principle is said to exist by the very nature of the *persona moralis*, and by virtue of *pura societatis mentis*). The fullest argument in favour of this view is to be found in Ickstatt, *de jure majorum in conclusis civitatis conventibus formandis* (*Opusc.* II, *op.* 1).

* It cannot apply to the 'universal society,' because that society, as its name indicates, includes all men, and there are therefore no non-nationes.

He appeals, in the first place, to the nature of the 'moral person', as a unity possessed of reason and will, which must determine its decisions, in any case of *votum disparis*, by the *votum fortiore*—though it is only the external [or quantitative], and not the internal [or qualitative], weight of 'motives' that can settle the issue. He then adduces, as a further argument, the possibility of removing a dead-lock between the different elements of the group-will which is provided by the use of majority-decision, and he also appeals to practical exigencies. But he maintains, notwithstanding (c. 1, §§65–68), that the majority-principle is based on *pactum* [which is somewhat inconsistent with the idea that majority-decision proceeds from the nature of the moral person as a unity].

A peculiar view appears in Darios (§§750–62), who, in the spirit of primitive Teutonic law, demands unanimity, though he also assumes an obligatio *perfecta* of the minority to accede to the decision of the majority.

New demand for unanimity

185. In his treatment of what he calls the 'great controversy', Christian von Schlözer (*De jure suffragii*, §§9–14) cites Grotius, Locke, Pufendorf, Petrone, Coccejo and Schlettwein as supporters of the earliest '*sententia opinio*' which regarded the validity of the majority-principle as derived from Natural Law. He describes the opinion of Wolff (unjustly) as doubtful. The main authorities he cites for his own view (which makes only unanimous decisions valid *per se*) are Hobbes—whose real doctrine, as stated in n. 34 to this section, is very different—and Rousseau. He also cites Achenwall (who does, as a matter of fact, identify the *solutio sententiae quae omnes fortiores* with the *consensus omnes omnium*, n. §§24–8, and treats the validity of majority-decisions as a deviation—though a useful deviation—from the general rule of unanimity, secured by a special contract to this effect), and he cites in addition Wedekind, Hopfner, Köhler and Schmalz.

A. L. von Schlözer on the idea of the People

186. According to A. L. von Schlözer 'majority' belongs originally to the people, but since the people is 'the whole of all the children of men', it can do as little with its sovereignty as a child can do with a fief which has fallen to it. Any real sovereignty of the people [as a whole] is altogether inconceivable, because the integrity of such sovereignty has already been destroyed [in any existing form of the so-called sovereignty of the people which we can actually observe] by the exclusion of women, minors and paupers, by the introduction of the majority-principle, and by the erection of a representative assembly (cf. p. 97, §3 and pp. 157–61). [Since the people can thus do nothing with its original sovereignty], that sovereignty is devolved upon a Ruler, who may be either a number of persons or a single person; but if a number of persons be the Ruler, a '*Unus moralis* must be pretended by that number' [i.e. they must feign themselves to be a single unit] (cf. pp. 73–8, 113, §1). Schlözer proceeds to describe such a collective Ruler as a 'being composed of several individuals' or a '*corpus*', but [though he thus seems to recognise group-existence,] he really remains a thorough-going individualist, even to the extent of holding that in a republic 'a new Ruler is created for each new decision of the government' [because a new majority composed of different individuals has to be created], and therefore a 'momentary Ruler' is all that can exist in such a State (cf. p. 113, §3, p. 125, §9, p. 131, §13).

The common will is not of souls

187. The 'common will', which (he remarks) thinkers from Rousseau onwards have irresponsibly identified with the 'common man',* is nothing

* Or, as we might express it, the 'general will' (which is the term that Rousseau really uses) is too readily identified with the 'general run' of people. Or again, to

but the 'sum of all individual wills', and therefore it is only sovereign in pre-political society, where pure unanimity is the rule. In the organised State, even if it be an extreme democracy, it is always a number of particular persons, or a single person, which wills and decides for all. The people, which gives such persons or person their commission, is simply tricked, by means of frequent elections, into thinking that it wills and decides through its representatives, or it is dazzled with the illusory idea that 'law is the true sovereign'—the fact being that law, as an abstract thing, can only act through men [and therefore can only be sovereign through the person, or persons, who declare and enforce it]. Cf. pp. 78–7 [of A. L. von Schlözer's *Allgemeiner Staatsrecht*, which Gierke is paraphrasing here, as in the previous note].

188. The social contract, according to A. L. von Schlözer, produces only a 'union of powers', and a 'union of wills' first arises through a supplementary contract of government, by which each man promises that 'others shall will instead of him, and that he will acknowledge this will, external to himself, as his own will, and shall be compelled, if he break his word, to recognise that it is his will'. It is this fact (that 'the most part renounce their will, and transfer it to one man, or to a number of men, or to the majority') which is the basis of majority-decisions, representative assemblies and the rights of rulers, op. cit. pp. 76–9, 93, § 1. The Ruler, being able to will and decide for all, is the 'depository of the common will', pp. 93 and 100. *The will of the Ruler as representative*

189. C. von Schlözer, *Ein paar stiff. an sac. sog.* (of the year 1795), § 11. In agreement with the theory of his father (A. L. von Schlözer), he adds that the *societas mere facta* is only a 'union of powers' to begin with, a new 'pact', by which each man surrenders his will, is necessary before a 'union of wills' can exist, and the comparison with a *persona* is only permissible when that pact has been concluded. He proceeds (§ 12) to attack the other arguments of the advocates of the majority-principle, on whom he significantly seeks to impose the burden of proof (§ 10). He frankly holds that any decision of any society requires an agreement of *all* its members, depending on their *pactum et consensus* (§ 9), and accordingly he will only recognise a decision by the *major pars* if it is based on special *pacta adjecta* to that effect (§ 15)—with the proviso that these *pacta adjecta* can never extend to the *pacta fundamentalia*, or the *jura majestatis*, or affect either (§ 18). He will not even allow that the absent are automatically bound by the vote of those present (§ 19): such a principle can only be introduced by *speciales pacta* (§ 19). *C. von Schlözer on the majority-principle*

190. Cf. p. 190: 'the conception of a moral person can thus be understood in the broad sense in which it includes every collective "Subject" or owner of rights and duties, whether such collective "Subject" be a society or no'. See also pp. 59, 66, 106, 206, 244, 292, 307–309, 310, 317–319. *Hoffbauer's theory of groups*

put the matter in another way, we may say that the *volonté générale* properly means a will that is general in respect of the quality of the object willed (which is the general good), but tends to be identified with a will that is general only in respect of the quantity of the subjects willing (or the general mass of the people). The confusion is inherent in Rousseau's thought, but it must be added, in fairness to Rousseau, that he did attempt to reconcile the two conceptions, feeling that the general mass, by the process of discussion of ideas which is the essence of the democratic system, was most likely to arrive at a general sense of what was really for the general good. In other words, the process of general thought, in the general body of a community, is the right way to the general good, which is the object of the general will and the sovereign standard of community-life.

Hoffbauer's theory of Groups

191 Pp 191 sqq and 199 sqq originally, unanimity was alone valid, but the majority-principle may be introduced by means of a unanimous resolution, provided that it be understood that the majority-principle has no validity in regard to the constitution, or as against the rights of a member.

192 Pp 205 sqq accordingly (Hoffbauer argues) it is the Ruler alone—or some 'society' which participates in Ruling authority—that appears in the area of internal public law as a 'moral person' (pp 244, 248, 292, 307, 310), and the People itself appears as a person only in the area of [external, or] international law (pp 317 sqq.).

193. W. von Humboldt's *Ideen*, p 130, cf §18 infra [on the natural-law theory of corporations]

194 See, more especially, II, c 7, §89, c. 8, §§95–9, c 12, §145.

195 II, c 8, §96

Locke on the majority-principle

196 II, c 8, §97–9 without a provision to that effect, the original contract would not achieve its aim of ending the state of nature, it would not produce at all, or would only produce for a brief space, a society with the qualities of a 'body incorporated' it would thus be without significance, and not a real contract at all

Rousseau on the true commun of the body politic

197 I, c 6 *à l'instant, au lieu de la personne particulière de chaque contractant, cet acte d'association produit un corps moral et collectif composé d'autant de membres que l'assemblée a de voix, lequel reçoit de ce même acte son unité, son moi commun, sa vie et sa volonté* [The reader will readily note, in this passage as elsewhere in the *Contrat Social*, how much Rousseau is indebted to the writers of the School of Natural Law alike for his thought and his vocabulary Hist *personne particulière* is the usual *persona singularis* his *corps moral et collectif* is the *corpus morale collectivum* We may almost say that the vogue of Rousseau depends on the fact that a great master of style gave to the world of letters, and the general reader, a system of thought which had hitherto been expressed reasonly in Latin, and written by lawyers [or lawyers.]

See in addition II, c 2, on the indivisibility of sovereignty which arises from the unity of the *corps social*, II, c 4, on the nature of sovereignty as an absolute power which the social body necessarily possesses over its members, just as the individual has an *pouvoir absolu sur ses membres*, and III, cc 10–11, on the sickness, age and death to which *corps politiques* are subject in the same way as the physical bodies of men, and on the act of prolonging their existence (*le corps politique, aussi bien que le corps de l'homme, commence à mourir dès sa naissance, et porte en lui-même les causes de sa destruction*). [On the birth and death of 'moral bodies' cf supra, nn 174 and 179]

Its personne morale the 'Subject' of Sovereignty

198. Cf I, c 6, where Rousseau explains that the *personne publique*, which is constituted by the union of all other persons, is called *République* or *corps politique*, but that it is also termed by its members (1) *État*, when it is passive, (2) *Souverain*, when it is active, and (3) *Puissance*, when it is compared with similar bodies outside Cf also I, c 7, where he speaks of a *personne morale, ou être de raison*, which in regard to foreign bodies is an *être simple*, and in regard to its subjects is *le Souverain* II, c · speaks of an *être collectif*, and II, c 4, where a *personne morale* is re the 'Subject' of political authority

Its volonté générale

199 II, c 3 *Il y a souvent bien de la différence entre la volonté de tous et la volonté générale, celle-ci ne regarde qu'à l'intérêt commun; l'autre regarde à l'intérêt privé, et n'est qu'une somme de volontés particulières: mais ôtez de ces mêmes volontés les plus et les moins qui s'entre-détruisent, reste pour la somme des différences la volonté générale*

générale. [It is interesting to compare Rousseau, on this fundamental matter, with Pufendorf: see iii 131, 132, 136. There is of course a difference, but Pufendorf is the rock from which Rousseau hewed.]

200 iv, c 2, where we also find an argument to prove that liberty is not destroyed by this agreement to respect majority-decisions. It is my own will that the *volonté générale* should be law. If I am out-voted, that shows that my view about the *volonté générale* was mistaken. I really willed what is now shown to be the *volonté générale*, and I did not really will what is now shown to be only my *volonté particulière*. Cf also ii, c 3 n. *Rousseau on majority-decisions*

201 It is presumably always directed to what is right and beneficial: it is incorruptible, simple and clear, without subtleties, and attained with little if any debate. It will not, and cannot, decree anything contrary to equality and justice: no guarantees are needed against it, and all that is required is the prevention of any deceptions. Cf i, c 7, ii, cc 3–4, iv, c 1. *On the quality of general will*

202 i, c 6: *à l'égard des associés, ils prennent collectivement le nom de peuple, et s'appellent en particulier Citoyens, comme participant à l'autorité souveraine, et Sujets comme soumis aux lois de l'État.*

203 It follows that the size of the State diminishes liberty. With 10,000 citizens, each has one ten-thousandth part of sovereign power 'for his share' with 100,000, only one hundred-thousandth part, but in both cases each is *toutes fois entier*. Cf iii, c 1.

204 i, c 7, each pledges himself by the social contract *tout un double rapport: comme membre du Souverain envers les particuliers, et comme membre de l'État envers le Souverain*, a contract thus made one *lex-rebus* is possible, because each contracts *envers un tout dont on fait partie*. Cf ii, c 4.

205 i, c 7, ii, cc 1–2, iii, c 16.

206. But the Sovereign can never incur such obligations towards a third party as contravene the act on which its own existence depends: i, c 7.

207 The reason why the Sovereign can never bind itself as a whole to its members is thus (i, c 7): the body politic, being only able to view itself always under one and the same *rapport*, would by contracting with one of its own members be *dans le cas d'un particulier contractant avec soi-même* [i e more the sovereign is, and must always regard itself as being, identical with the members, it cannot contract with what is itself, any more than an individual can contract with himself. But the original contract of society is apparently an exception to this rule, cf n 204 supra.] *The Sovereign can never bind itself to its subjects*

208. iii, c 12–14. Any formal exclusion of a single citizen annuls the general will (ii, c 6 n.)

209 Cf iii, cc 14, 18: cf also the argument, in iii, c 11, that the sovereign will of yesterday does not bind that of to-day (*la loi d'hier n'oblige pas aujourd'hui*), and therefore the validity of [past] laws depends on the presumption that the sovereign is always confirming them tacitly by not revoking them.* *Yesterday's will not binding to-day*

210 iii, c 15: the sovereign can only act *quand le peuple est assemblé*.

211 Cf. ii, c 1: *le Souverain peut n'est qu'un être collectif ne peut être représenté que par lui-même*. Cf also iii, c 15: sovereignty can no more be represented than it can be alienated, because though power can be transferred to others, *Rousseau on representation*

* Cf Paine's *Rights of Man*, where the same idea is applied to each generation: 'Altho' laws made in one generation often continue in force through succeeding generations, yet they continue to derive their force from the consent of the living and the non-repealing passes for consent'.

will cannot be elected deputies of the people cannot be representatives, but only commissaries or delegates. What *le Peuple en personne* does not enact is not law, the people which is 'represented' is no longer free, and no longer a people.

The 'organic' metaphor in Rousseau

212. Although the legislative power is compared to the heart of the body politic, and the executive to its brain, and the importance of both for political life is measured by that comparison (III, c. 11), this solitary reference to the analogy of the organism remains without influence on Rousseau's general interpretation of Group-personality. [But cf. also note 197 *supra*.]

Rousseau's use of 'Government'

213. III, cc. 1–5, 16–17. The *gouvernement* is *un corps intermédiaire* between the Sovereign and the members of the State: it is *un tout subalterne dans le tout*, it is a *new personne morale dans la personne publique*. Since its province is simply the execution of the sovereign will, and since, in its capacity of *agentur du souverain*, it holds a commission which can be limited at will and is always subject to recall, the 'government' has no will of its own, but has merely *une force propre et subordonnée*. None the less it requires, if it is to fulfil its object, a unity of its own and its own special qualifications, and it therefore develops, in virtue of the authority with which it is vested, *une vie réelle, un moi particulier, une sensibilité commune à ses membres, une force et une volonté propres, qui tend à la conservation*. It is thus, in small, *ce que le corps politique qui le renferme est au grand*. There are different ways in which it may be constituted, but it is always a Whole with a definite totality of power, part of which it employs in order to keep its own members in co-operation, while it retains the rest for the purpose of acting upon the whole people. Three wills meet in this government—the individual wills of its component members, the common will of them all, and the general will of the whole State—but in a perfect condition of things the first of these would be non-existent, and the second would only be the expression of the third.

It is a collective person

214. In III, c. 1, Rousseau terms the 'person' of the government a *personne morale et collective, une par la force des lois et dépositaire dans l'État de la puissance exécutive*. Its essential difference from the sovereign 'person', he holds, consists in the fact that it only exists in virtue of the Sovereign, and not, like the Sovereign, *par lui*. As a whole, it is called the 'Prince', and its members, who may be collective persons themselves in their turn,* are called 'magistrates'. In a monarchy, however, the government (according to III, c. 6) is identical with a '*personne naturelle*': *tout au contraire des autres administrations, où un être collectif représente un individu, dans celle-ci un individu représente un être collectif*.

215. Filangieri (I, cc. 1 and 11; VII, c. 53) follows Rousseau's theory entirely.

Sieyès generally follows Rousseau

216. Cf. Sieyès, I, pp. 50 sqq., 129, 144 ('a political society cannot be anything but the associated members of such society when taken together'), 167, 445 sqq.; II, pp. 195 sqq.

217. Cf. I, p. 129: the common will is a unity, but its essential elements are the wills of individuals, only they are no longer isolated. Cf. also I, p. 145, where it is said that 'the will of the individual is the only element in the social will', and I, p. 167, where the will of the Nation is said to be 'the result of the will of the individual, because the nation is a sum of individuals', and where it is argued accordingly that this will can never be mediated or

* I.e. a 'college' of magistrates, which, as such, is a collective person, may be one of the parts of government.

expressed by estates or corporations, but only by heads [i e by direct individual suffrage], on the basis of a general unity and equality. Similarly Sieyès remarks (1, p 207) that the common will of a social group 'must naturally be the general sum of the wills of all individuals', cf also pp 431 sqq

219 Cf 1, pp. 144–5, 167, 207–8 for the future, he argues, we must ascribe the quality of a general will to the will of a majority this is based on the fact that each submits himself freely in advance, with a reservation of the right to emigrate [if he disagrees with the majority-will] his staying in the country is a tacit confirmation of the obligation he originally assumed, and thus the common will always continues to be the sum of individual wills

Sieyès admits representation

218 For Sieyès' views on representation see 1, pp 68 sqq , 129–30 (where he speaks of government conducted by proxy, and of the representative will of an assembly of deputies, in which the common will is, as it were, in commission), 134, 144 sqq , 195 sqq , 208 sqq (where deputies are described as representatives, with a general mandate, which remains none the less at the free disposal of those who gave it, and is thus revocable as well as limited, so that the decision of the representatives is 'the product of the generality of the wills of all individuals'), 375 sqq , 385 sqq , 2, pp 275 sqq and 378–4 (where it is argued that everything in the social state is a matter of representation, and that men increase their liberty when they allow themselves to be represented in as many ways as possible, just as they diminish it when they accumulate a number of different representative capacities in one person)

220 Cf 2, pp 371 sqq there is, essentially, only one political authority, but there are different forms of representation based on different mandates

221 This is the case with Schiedsmannstel, the Schiedsmann (father and son), and Hoffbauer, cf pp 196–7 supra, and nn. 189 and 186–90 to this section,

Fichte and Rousseau

222 Cf Fichte's *Naturrecht*, 2, pp 19 21 (*Werke*, 10, pp 204 6) it is only 'hypothetically' that the individual is also a subject, for he only becomes such if he fails to fulfil his duties Cf also *Werke*, vii, pp 153 sqq

223 See, for all this, the *Naturrecht*, 2, pp 15–18 (*Werke*, iii, pp 202 –4) cf also 2, pp 23–4 (*Werke*, 10, pp 207–8)

224 *Naturrecht*, 2, pp 17, 19, 23–4, 34 sqq (*Werke*, iii, pp 203, 205, 207–8, 215 sqq) In the later *Rechtslehre* (*Fischer Werke*, 2, pp 495 and 692) he still holds that the whole is only the 'totality of the members', and that there can be nothing in the whole which does not exist in a part

Fichte on moral persons

226 Thus he remarks that 'physical, or mystical, persons' may either of them exercise public authority, but he proceeds to explain a 'mystical person' as being the majority at any given time, and therefore as 'frequently also a variable person', *Naturrecht*, 2, pp 191 and 195 (*Werke*, iii, pp 159 and 161) Again, arguing that marriage is a natural and moral society, he counts husband and wife as 'one person', and he draws the conclusion that, within the household, there is complete community of property, though externally the one 'juridical person' is represented by the husband alone, who can act for his wife along with himself similarly a married couple, as one juridical person, has only one vote, which is given by the man, though his wife may also give it on his behalf in the popular assembly if he be prevented from doing so, but unmarried and independent women have their own right to vote (*Naturrecht*, 2, pp 158 sqq and 219 sqq = *Werke*, iii, pp. 304 sqq and 343 sqq). Cf. also 2, p 1 = *Werke*, iii, p 191

226 *Naturrecht*, II, p 250 = *Werke*, III, p 371 *Rechtslehre*, p 698

227. *Naturrecht*, I, pp 182sqq and 186sqq = *Werke*, III, pp 108sqq and 150sqq ; *Rechtslehre*, pp 507sqq and 637sqq No account can be given here of the subtle chain of deductions by which Fichte attempts, in his *Naturrecht*, to solve 'by a strict method' the problem 'of finding a will such that it is simply impossible for it to be other than the common will, or, in other words, a will in which private will and common will are synthetically united', nor can we attempt to describe the modifications in the solution of this problem which are introduced in the *Rechtslehre*

Fichte on the majority-principle

228 *Naturrecht*, Introduction, II, and vol I, pp 198, 217sqq , 225 sqq = *Werke*, III, pp 16, 164, 178sqq , 184sqq Absolute unanimity is needed not only for the political contract, but also for every alteration of a 'constitution based on Right and Reason' (though any person may take in hand the transformation of a constitution which is not based on Right into one which is) relative unanimity is sufficient for the election of individual magistrates, and also for decisions of the people in regard to a magistracy or Ephorate which has offended against Right, i e a very considerable majority (say seven-eighths) may exclude dissentients from [participating in the action of] the State on such issues

229 *Naturrecht*, I, pp 179sqq , 196, 201sqq , 206, 210–16, 220sqq = *Werke*, III, pp 159sqq , 169, 166sqq , 170, 173 7, 182sqq , see also *Werke*, IV, pp 238sqq For the exercise of its sovereignty the People must assemble as the 'community', though in great States it need not assemble in one place, but may gather 'here and there in really considerable bodies'

Fichte on representation and on 'Ephors'

230 *Naturrecht*, I, pp 179sqq and 191sqq = *Werke*, III, pp 159sqq and 169sqq In order that the common will, which shows itself primarily in the unanimous will of all, may always remain a really common will, the exercise of public authority must be transferred to one or more persons (the Executive), and this transference involves in its turn the appointment of representatives of the people to watch the Executive (the Ephorate, or body of 'overseers'). The reason which Fichte gives is significant since both the law-breakers and the injured persons, who represent private wills, are simultaneously also members of the community, it follows that the community [if it attempted to deal with the conflict, instead of leaving it to its representatives] would be both judge and party to the suit in the case at issue between the two sides [We may note that Fichte's 'Ephorate' has an ancestry it goes back through Althusius to Calvin, cf supra p 248]

The People always finally Sovereign

231 *Naturrecht*, I, pp 192, 204–9, 224 = *Werke*, III, pp 160, 169–73, 183 thus he speaks of the responsibility not only of the government, but also of the ephorate, of the final decision of the community, of the right of revolution in the last resort, and of the total cancellation, by the community's immediate declaration of its will, of any assumption seeming to suggest the expression of that will by those who are really its servants

232 *Naturrecht*, I, pp. 213–15 = *Werke*, III, pp 173–7.

233 Such an organic conception appears in the *Grundzüge des gegenwärtigen Zeitalters* (*Werke*, VII, pp 144sqq), the *Reden an die deutsche Nation* (ibid pp 380sqq), and the *Staatslehre* (ibid. IV, pp 429sqq and 439sqq)

234. In particular, he never attacks any conception of the State's personality

235. See Kant's *Metaphysik der Sitten*, *Werke*, VII, pp. 1 and 20.

236. *Werke*, VII, pp 130–3 and 142–6

237. *Works*, VII, pp. 161 and 165, and the essay *Zum ewigen Frieden*, VI, pp. 405–499. Kant derives the whole of international law from the axiom that States stand to one another in the position of 'moral persons' in the state of nature—subject, however, to an obligation of Right that they should enter into a system of legal relations. Arguing that it is wrong to abolish the existence of the State as a moral person, and to turn it instead into a mere 'thing', he deduces from that argument the illegality of arrangements by which one State can acquire another, as if it were a thing, through inheritance, purchase, exchange or donation, or by which 'States can marry one another', as has hitherto been the usage in Europe [cf. 60, *fdhr Anmerk.*, *infra*]. *Kant's view of States as moral persons*

238. The three powers are 'the united common will expressed in three persons' (*Works*, VII, p. 131). They are 'co-ordinated' with one another 'as so many moral persons', but at the same time they are also 'subordinated', under a system by which each of them, 'while commanding in the capacity of a separate person, usques its commands under the bonds imposed by the will of a person who is superior' (ibid. VII, p. 134). The supreme Head of the State can be either 'a physical or a moral person' (ibid. VI, p. 323, VII, p. 134); the high court of justice is 'a moral person' (ibid. VII, pp. 95 and 97). People and Sovereign, 'legally considered, are always two separate moral persons' (VII, p. 198). *Authorities in the State moral persons in Kant's view*

239. Kant often opposes the 'State', in the sense of the Ruler, to the 'people' (e.g. VI, pp. 418 and 421), but, conversely, he often defines the 'State' as 'a union of a multitude of men under rules of law' (VII, p. 191), and he thus identifies it with the 'People' (VII, p. 137). *Kant on State and People*

240. *Works*, VI, pp. 327–499, VII, pp. 131 and 133. 'The people becomes a State when *omnes et singuli* surrender their external freedom, in order to receive it back again at once as members, 'as parts of a common existence, i.e. of the people regarded as a State', all now decide about all, and therefore each about himself, and since no man can do wrong to himself, this is the origin, and the only origin, of binding law.

241. *Works*, VI, pp. 327–8 and 416–20, VII, pp. 54, 62–3, 66–7, 106, 191–2. Kant always speaks of the 'will of the whole people', 'the agreement of all', 'the united will of a whole people', 'a collectively general (or common) will vested with power', 'the united will of all', 'the concentrated and united wills of all', etc. In doing so, however, he limits the right to join in expressing this will to those who have the right to vote—a class which does not include those who work for wages—though he admits the principle of equal voting by heads within this class (VI, pp. 327–8). *Kant on the will of the People*

242. *Works*, VI, pp. 328–9, cf. pp. 331 and 396, where the Supreme Head of the State appears as the 'representative' or 'agent' of the sovereign power, and where it is argued accordingly that 'his will gives commands to his subjects, as citizens, only because he represents the general will'.

243. Cf. VII, pp. 36–7, where Kant, arguing that the theory of law, like that of morals, is a theory of duties, contends that man can and must be considered, from the standpoint of such theory, 'in the light of his attribute of possessing capacity for freedom—a capacity which is wholly supra-sensual—and therefore in the light of his pure human character, as a personality independent of physical determination, in contradistinction to himself in his other character of a being affected by such determination, i.e. a member of the human species (*homo phaenomenon*)'. See also p. 153, n. E, where Kant *Kant on 'phaenomenal' and 'noumenal' Man*

corpus it is subject who is undergoing a penalty is, as such, a different [illegible] the 'co-legislator' who enacts the penal law 'When I pass a penal law against myself as a law-breaker, what happens is that the pure law-giving Reason in me (the *homo noumenon*) subjects me to that law as one capable of breaking it, and therefore as another person (the *homo phaenomenon*), at the same time that it subjects all the other members of the civic association' Cp the consequences derived from this distinction [of noumenal and phenomenal man] in the *Tugendlehre* (pp 195sqq, 202, 241 sqq, 244sqq), where they are made to include (1) the possibility of a duty which one must enforce upon oneself, (2) the absolute value of persons, as ends in themselves, and never means to ends outside themselves, and (3) the possibility of being one's own court of law

244 Cf *Works*, vi, pp 303sqq, vii, pp 158–9 and especially p 173

The renewal of the 'organic' metaphor

245 We find such analogies with the organism drawn by a number of writers Spinoza (cf *Tract pol* c 2, §15, c 3, §§1, 2, 5, and *Eth* iv, prop 18 schol) generally describes the state as mens corpus with mens mater Pufendorf (*J N et g* viii, c 12, §7) expounds a theory of the 'three species of bodies' (natural, artificial and moral), and ascribing to the moral species a unity which is produced by a *magnum morale*, and remains constant through all the changes in its composition, he concludes that the State, as an example of the moral species, *est res quaedam unica et continua, animalis instar* Hertius, in the *De modo cons* sect 1, §§2–3, speaks of *mas quasi personae*, an *mens corpor*, which remains identical through all changes and preserves permanent attributes, and of an *unum ex corpore*, coming in virtue of an *augmentum*, cf his *Animadversiones* in Pufendorf's *Jus nat et gent* 1, c 1, §9 n 4—*quemquam urgent quasi entium moralium et naturalium magnum interdum cum analogiam*, e g *corporis humani et civitatis, quae unum corpus esse et unum sui intuitu habere dicitur* (see also p 123 supra) Analogies with the organism are also drawn by Gundling, *De usu dirig* §§6–8, Schmier, 1, c 9, no 66, J H Bechmer, *P spec* 1, c 2, §§1–2 (*corpus morale*, and *unum spiritus*), Achenwall, n 160 to this section Note also the elaboration of the analogy with the various limbs and organs of the natural body by Krichen (*Opus pol* 1, c 6, th 11, where head, eyes, tongue, ears, hair, arms, feet, joints, heart and neck are found for the *corpor mysticum ad corporis sui utraque membra commutatum*, and reference is made to the similar, if in some respects different, *jeux d'esprit* of Guevara, Facius and Hobbes)

246 Cf supra, nn 195, 197 and 204 to this section

The idea of the mechanism

247 This idea [of an artificial imitation of the living organism] appears in Spinoza, loc cit We also find it in Pufendorf, who expressly commends the analogy with *horae artificiosae* (n 144 to this section), and argues (*J N et g* viii, c 12, §7) in favour of the permanent unity of the 'moral body' from the reason laid down by Hobbes in his *Philosophia prima*, c 11, §7, that *it was also proprie formam habere, quae ut plurimum manet, eamque saltem ut, manente ea principio idem ut individuum* The idea also appears in Hertius (supra, n 148 and n 160 to this section), in Gundling (n 163 to this section), and other writers, cf also Horn, supra p 115

248 Cf supra, pp 128–130 and 130–4 Rousseau even describes the governing body, in so many words, as a *corps artificiel* which is created by another *corps artificiel*, iii, c 1.

249 We thus find the analogy of the organism entirely absent from the writings of Thomasius, Wolff, Darjes, Nettelbladt, the Schlözers (father and

son), Hoffbauer, W. von Humboldt and Kant. Mercier de la Rivière explicitly says that a nation is not a *corps moral*, and that it has no single will. *Ce qu'on appelle une nation ou corps n'est donc jamais qu'une nation rassemblée dans un même lieu, où chacun apporte ses opinions personnelles, ses préventions arbitraires et la force violentée de ses forces intérieures.* A majority is never more than a 'collection of interests' and a variable 'result of egoisms', and unanimity is impossible (c. 18).

The State a machine

260. A. L. von Schlözer says (p. 3) that 'the most instructive way of dealing with the theory of the State is to treat the State as an artificial machine, entirely composed of assembled parts, which has to operate for a definite end', cf. pp. 99, 157. Kant similarly speaks of the 'mechanism' or the 'machine-like character' of the constitution of the State, and describes the State as 'the mechanical product of the union of the people by coercive laws' (*Werke*, vii, pp. 157–8). Sieyès, though he does not wholly succeed in avoiding the comparison with a body (i, pp. 289 sqq. and 445 sqq.), bases the State entirely on 'the mechanics of social art' which reason provides (i, pp. 188, 195 sqq., 217 sqq.; ii, p. 370). [Tom Paine, would-be engineer and bridge-builder, similarly uses mechanical analogies in his *Common Sense* of 1776, e.g. 'as the greater weight will always carry up the less, and as all the wheels of a machine are put in motion by one, it only remains to know which power in the constitution has the most weight, for that will govern'.]

Failure to face the problem of Group-personality

261. We find this [failure to face the problem of Group-personality] in Praechius, Flacius, Alberti, Fabner and other anti-individualist thinkers. It is also to be found in Justi. It is true that he emphasises strongly the organic nature of the 'moral body', arguing that the commonwealth is 'a single indivisible body, which has the closest connection in all its parts', and seeking to prove, by this argument, the necessity of a single group-authority controlled by a rational will, the existence of a system of reciprocal interaction by which all the parts affect one another and the whole, and the pernicious results of any superfluous part which contributes nothing to the general system. But he has nothing whatever to say about the personality of the State or the people (cf. his *Natur und Wesen*, §§23–6, 28, 45–50, and his *Grundriss*, §§15, 17, 23 sqq., 29 sqq.).

262. Mevius for example, though he makes it the object of political association *ut unus solus persona sit, cui una mens, unus animus, una voluntas et denique inter multos solus sapiat sudum*, makes the unity of this person depend for its existence entirely on the submission of all other wills to the will of a representative Ruler (see n. 105 to this section). In the same way S. de Cocceji will only recognise a representative and collective unity of [group-]persons,* notwithstanding the fact that he extends the conception of the social body, with authority over its members, until it is made to embrace the State, the Corporation, the [College of] Magistrates and the Family. The result is that all these bodies remain for him *corpora artificialia sive spiritua*, except that the Family is *magis naturale* than the rest. Cf. his *Nov. Syst.* §§199, 205, 280–1.

Leibniz's theory of corporations

263. Leibniz argues (*Nova methodus*, §16) that the legal 'Subject' (the *subjectum* of a 'moral quality' which may be either a right or an obligation) can be either a *persona* or a *res*. Defining the former as a *substantia rationalis*, he then distinguishes between *personae naturales* (*Deus, angelus, homo*) and

* I.e. they are 'one' in virtue of being 'represented' by a single agent, or 'one' in the sense of being a collective aggregate of wills, but not 'one' inherently and in themselves.

persona unita (collegium, quod quo habet unum voluntatem civile ergo dignoscitur— e.g. ut plurialitas rerum, res, etc.—sine obligatio et obligatio patet). He regards a *res* as the 'Subject' of rights and duties when e.g. property is left to an infans, or an infans is made responsible for some act, and generally in any case of *res nova*.

He describes a *persona unita sive mutata*, in so many words, as a *persona facta*, brought into existence *ad instar naturalis* by an artificial union of wills, and to be regarded, as the last resort, as an aggregate or collection of rights *In pure republicae persona quae titulo sui mutuo contentur, non omnes personae unitae sive facta corporum, collegiorum, universitatum ut aggregatione personam constituat* (*Spec. dem. pol.* prop. 1, p. 525) *persona unita omnium personarum collectio est* (ibid. prop. 57, p. 585); cf. also the Introduction to *Cod. gent. dipl.* 1, §102, p. 306, and *Gesar.-Fürst.* c. 11. He regards the person of the State as identical with that of the Ruler, and he makes it accordingly a *persona naturalis* in a monarchy, but a *persona unita* in a republic (Introduction to *Cod. gent. dipl.* loc. cit., *Gesar.-Fürst.*, loc. cit., *Spec. dem. pol.* prop. 1, 19, 57). In international law, therefore, both 'natural' and 'civil' persons are in his view 'Subjects' of rights (Introduction to *Cod. gent. dipl.* loc. cit.), but he argues that if [friendship is nowadays rare *inter principes* (*Spec. dem. pol.* prop. 41, p. 560), neither friendship nor enmity is possible *inter Respublicas*. Such feelings arise *ex amore*, and *amour sui* is *personarum naturalium sit, civitatum nullus*, and [while the 'civil person' of a republic thus cannot have friendship or enmity with another State, because it has no *amour*, neither can the 'natural persons', or individuals, who constitute such a corporate person, because these] natural persons and their *amour* are in a state of perpetual flux (ibid. prop. 41, p. 561).

For a critique of the view recently advanced by C. Ruck (*Die Lehrmeinte Staatslehre*, Tübingen, 1909)—that Leibnitz understood the personality of the State in our modern sense, and created the legal notion of 'organ' to express the relation of the Ruler to that personality—see the author's review in the *Deutsche Literaturzeitung* of 1910, pp. 556–8.

No real idea of Group-personality in the eighteenth century

254. Any such legal conception of Group-personality is not to be found in Montesquieu, Vico or Ferguson. Frederick the Great has some elements of the conception: on the one hand, he represents the State as an animate body with limbs and organs, and explains its birth, its maladies, its death, and the peculiarities of its nature, by means of a comparison with the individual man (*Antimach.* cc. 3, 9, 12, 20; *Considérations*, in his *Works*, viii, 24, *Essai sur les formes*, ibid. ix, 197 sqq.): on the other hand, he regards the Ruler as only [an 'organ', or] *le premier serviteur et pensieur magistrat de l'État* (*Antimach.* c. 1, *Mémoires*, in his *Works*, v, 123, last Testament, ibid. vi, 213, *Essay*, ibid. ix, 197), but in spite of these two complementary ideas he never attains to any clear expression of State-personality.

Justus Möser knows nothing of any 'person' of the State (*Patriot. Phant.* 1, no. 62): he even disputes the right of a nation to give itself freely a new constitution, on the ground that it is 'not a single being in itself', but is composed of two classes which, if either is united internally, are only connected together in their relations with one another as separate parties to a contract (*Mos. Writings*, 1, pp. 355 sqq.).

Herder again—however vigorously he may champion the idea of development, however resolutely he may insist on regarding the life of a people as the common life of an organism, however frequently he may speak of a

national spirit and a national character—none the less fails to transcend a mechanical conception of monarchical institutions when he seeks to analyse actual States (*Idem*, III, c 4, XIII, c 6). While he traces 'the first breath of a common existence' in the constitutions of towns, guilds and universities, he never carries his account of the 'body politic' to the point where he reaches the conception of an immanent Group-personality (*Ibid* XIX, c 5).

§ 17 THE NATURAL-LAW THEORY OF THE STATE

Universal public law

1 Cf Huber, I, c 1, §§19–23, Hert, I, 1, pp 1 sqq., J H Boehmer, *P pen* c 3, §§11 sqq., Schmier, *Jur publ* xxiv., *Dus praemitula*, Darres, *P pbc* §§63 sqq, Achenwall, II, §§85–7, Heineccius, *Prolog* c. 1, §10 By all these writers *jus publicum universale* is identified with *jus publicum naturale*, or with a part of *jus naturale naturale*, and the distinction drawn between public law and political theory is explained as consisting in the fact that the State is considered in the former *rationa juris*, and in the latter *rationa status* J H Boehmer was the first to compose a separate compendium of *jus publicum universale* [or, as French writers express it to-day, '*droit constitutionnel comparé*'] under that title

Attacks on the theory of 'double majesty'

2 At first we find no distinction drawn, by those who are engaged in attacking the older doctrines, between the pure theory of the sovereignty of the people and the theory [of the co-existence] of *majestas realis* and *personalis* cf. Micraelius, I, c 10, §§10 sqq and qu 7, pp 112 sqq, Cellarius, c 9, §§18–25, Felwinger, *Ele maj* §§23 and 41, Huber, I, 3, c 3, §24, I, 3, c 1, §§11–20, Pufendorf, *J n n g* VII, c 2, §14, c 6, §4, and *De off hom c* xii, II, c 9, Thomasius, *Instit jur div* III, c 6, §101, J H Boehmer, *P jus* I, c 4, §22 n 1 and 28, c 9, §5, n 4, Schmier, II, c 1, n 2, §1, nos 48 sqq

Gradually, however, both of these theories [that of popular sovereignty and that of 'double majesty'] were lumped together, and any conception of *majestas realis* was stigmatised as a product of 'monarchomachism' Horn [who wrote about 1660] is already condemning 'real majesty' as a *monstrum* and *fabulosus factus* indeed he even declares the theory of 'real majesty' a criminal theory, and expresses a pious wish for the execution of its advocates, adding that, if they live in a neighbouring 'plebeian' State, a request addressed to that State for their execution would be warranted by international law (II, c 10, §§11–15) See in addition Ziegler, I, c 1, §§44 sqq, Boecler, II, c 1, pp 99–8 (where the theory of real majesty is said to be a theory of *rigendae*), Becmann, c 12, §11, Hert, *Opusc* I, 1, pp 307–19, Kestner, c. 7, §9, Struvh, *Dus* XIV, no. 7, c. 2, no. 54, Gundling, *Jus nat* c 38, §102 (such theories are *insania atque furores*), Alberti, c 14, §3, Heineccius, *Praelec* I, c 3, §§8–9 and *Elem jur nat* II, §§190 sqq, Rachelius, I, tit 32, §2 (the theory is *insana persuasio*), Heineke, I, c 2, §15, c 3, §4, Kreittmayr, §5; Schmelzenantel, I, pp. 111 sqq (where even the theory of Rousseau is described as a theory which makes 'real' majesty exist by the side of 'personal', and is controverted accordingly).

Fortunes of Grotius' theory of the subjectum commune

8. Thus Boecarus writes (c. 12, §7): *subjectum majestatis est non Respublica sed personae morales quae Reipublicae subsunt, hae personae majestatem quae moralitate unius repraesentant.* But what he understands by *Respublica* is no more than *unitas* or *summa manus*, and he proceeds to assume a system under which this collective body is represented by the *Imperator* so perfectly that neither is superior or subordinate to the other, but the one stands to the other in the same relation as an object does to its reflection in the mirror. Cf. also Treuer, on Pufendorf, *De off. hom. et civ.* II, c. 7, §9 (*rationalem perpetuam majestatis subjectum manet*), Rachelius, 1, tr. 32, §2, Mullerus, 1, c. 7, §65.

4. Schmier, for example, holds that it is possible to follow Grotius in assuming both a *subjectum commune* and a *subjectum proprium*, provided that the distinction be interpreted as it is by Boecler and van der Muhlen in their notes to Grotius—i.e. provided that it be understood to refer merely to the inseparable connection of majesty with the *corpus reipublicae non formatum* and the possible reversion of this majesty to the people (II, c. 9, n. 1, §1). Kulpis (in his *Exerc. ad Grotium*, II, §6 n.) and Hert (p. 298, §12) take a similar line. Ickstatt interprets the *subjectum commune* of Grotius as signifying merely the original sovereignty of the people, and he therefore prefers to substitute the terms *subjectum constitutivum* and *activum* [for *subjectum commune* and *proprium*], cf. *Opusc.* II, no. 1, c. 1, §10.

5. Cf. Horn, II, c. 11, §1, Pufendorf, *J. n. et g.* VII, c. 6, §4, *De off. hom. et civ.* II, c. 9, Kestner, c. 7, §9, Boecler, *Instit.* II, c. 1, Alberti, c. 14, §9, Stryck, *Dist.* XIV, no. 7, c. 2, no. 55, Heineccius, 1, c. 2, §15, c. 3, §4.

6. Cf. *supra*, pp. 171 and 215–6, see also, for answers to Horn's theory, Huber (1, 3, c. 2, §§7–9) and Pufendorf (*J. n. et g.* VII, c. 5, §5, *De off. hom. et civ.* II, c. 8, §4).

7. See Spinoza, *Tract. theol.-pol.* c. 16, *Tract. pol.* c. 6 sqq., Micraelius, 1, cc. 10, 13–15, Huber, 1, 3, c. 9, 1, 7, c. 1, Pufendorf, *J. n. et g.* VII, c. 5, *De off. hom. et civ.* II, c. 8, Leibnitz, *Spec. pol. dem.* prop. 16–18, Hert, *Opusc.* 1, 1, pp. 319 sqq., Titius, VII, c. 7, §§17–28, Bonnet, II, art. 1, J. H. Boehmer, *P. spec.* 1, c. 3, §13, c. 4, §§93–94, Schlozer, 1, c. 3, Heineccius, II, §§1163 sqq., Wolff, *Instit.* §§990 sqq., *Jur. nat.* VIII, §§131 sqq., Darjes, §§747 sqq., Nettelbladt, §§1133, 1133 sqq., Achenwall, II, §§149 sqq., Schmelzing, 1, pp. 39–40, Hoffbauer, pp. 206 and 293 sqq., A. L. von Schlozer, pp. 75 sqq. and 95, §2. The last of these writers states 'the Ruler is the Ruler, the depository of the common will, be he one, or none, or many. Crown, sceptre and throne are symbols in Schaffhausen and in Stamboul'. This principle 'overturns once and for all the impotence of the single ruler, and awakens the democrat from his dreams of liberty' [i.e. it shows to the one that he is but a depository, who has received his authority as a deposition—'a thing for custody, to be redelivered on demand'—as it shows to the other that even in the democracy of his dreams there cannot be absolute liberty, without any sceptre or throne, since while there is a society with a common will man cannot be, as Shelley dreamed,

> Sceptreless, free, uncircumscribed, the king
> Over himself]

Sovereignty the same in all forms of State

On the other hand we find Gundling contending (*Jur. nat.* c. 37, §§3–10 and *Dist.* c. 36) that, while there is rule by *una persona* even in a republic, this 'person' is only *moraliter una*, and the process of deliberation which must necessarily precede its decisions makes the *supreme potestas* weaker.

8 Cf Huber, 1, 2, c 3, and his *Opera minora*, 1, no 2, c 7, Pufendorf, *J n et g* vii, c 2, §14, c 6, §§4sqq., Alberti, c. 14, §3, Hert, *Opusc* 9, 1, pp 311sqq., Gundling, c 37, J H Boehmer, *P jusc r*, c 4, 10, c 2, Titius, vii, c. 7, §§20–6, H Coccep, *Prodromus*, § Coccej, §§617–18, Schmier, ii, c 4, 2 2, §2, no 109sqq, Heineccius, ii, § 138, Ickstatt, *Opusc* ii, op 1, c 1, §§14–15, Kreittmayr, §5

9 In developing these ideas, the thinkers of this age were no more successful in eluding the contradictions which they inevitably entailed than those of a previous age had been (cf supra, p. 43 and n. 43 to §14) Most of them assumed that there must have been, even in a democracy, a formal transfer upon, which had taken the form of a contract of subjection made with a permanent popular assembly or a majority thereof (See Machiavelli, c. 10, §§9sqq, Huber, 1, 2, c 3, §§25sqq, c 4, §§1sqq, Pufendorf, *J n et g* vii, c 5, §§6–7, *De off hom et cit* ii, c 6, §9, Boeckmann, c. 10, §§4sqq., Hert, *Opusc* 1, 1, pp 286sqq. and 311sqq, Kestner, 1, c 7, §3, Heineccius, ii, §§129sqq, Darres, *Praecepta* §24 and *Jus nat* §§658–60, Ickstatt, §§8sqq) Those who made this assumption were forced to suppose that the other party to the contract [i e, the party other than the permanent popular assembly or a majority thereof] was either (1) the sum of all individuals, or even (2) a minority of those individuals,* and they were thus compelled to make democracy an exception from the general scheme which they applied to all other forms of State [Strictly speaking, we may argue that on the first hypothesis, i e the hypothesis that the sum of all individuals contracts with the popular assembly, there will be no exception from the general scheme, which makes *all* individuals contract with a Ruler, but there will be the difficulty, or the absurdity, that the two parties to the contract are the same, and *A* is merely contracting with *A* On the second hypothesis, i e the hypothesis that a minority of individuals contracts with the majority of the popular assembly, this difficulty or absurdity disappears, because the parties are different, but there is now an exception from the general scheme, because it is only a minority (and not, as in the general scheme, *all*) which is the other party to the contract with the Ruling Authority]

The problem of interpreting democracy in terms of contract

Other thinkers dropped the idea of a contract of subjection altogether in treating of democracy, and only spoke of a separate agreement or decision (following on the primary contract of society) to retain sovereignty instead of transferring it This idea, which agrees with the doctrine of Suarez, appears particularly in Schmier, ii, c 1, 2 3, §3 and c 4, 2 2, §3, and he is led by his logic to argue that the reversion of original sovereignty to the people [in a case where that sovereignty has not been retained, but transferred] does not *ipso facto* produce a democracy, but only the possibility of instituting either that or another form of State [according as the people, now in possession of the reversion of its sovereignty, decides either to retain it or to transfer it] The idea may also be traced in Wolff, *Instit* §982 and *Jus nat* viii, §§97 ff, Neuchlaeti, §1 130, and Achenwall, 1, §§96–98 and 174–179 But the thinkers who propounded this idea failed to explain how the nature of social authority could be changed [i e how vague popular sovereignty could pass into a definite democratic authority] when the 'Subject' of such authority underwent no change

10 Spinoza, *Tract theol-pol* c. 16, *Tract pol* cc. 6–11. It is true that

* The other party which contracts with a majority of the popular assembly may naturally be supposed to be the minority.

Spinoza on monarchy

Spinoza regards an *omnimoda absolutum imperium* as desirable only in a democracy, which he considers the most natural and perfect of all forms of State—or, to a less extent, in an aristocracy. But just for this reason [i.e. just because he confines absolutism to democracy or aristocracy], he rejects monarchy, as being a form of government which is necessarily absolute by its very idea, and he substitutes for it a mixed constitution. [Strictly speaking, Spinoza does not 'reject' monarchy. He argues that, *potentia* being *jus*, the form of State which has most *potentia* will have most *jus*, and he criticises monarchy accordingly, not because it is absolute, but because it cannot be absolute—in other words because one man cannot, however much he may try, possess as much *potentia* (by which Spinoza means mainly power of intellect) as a number will possess, and cannot therefore possess as much *jus*. Having criticised monarchy as defective in power, and therefore in right, Spinoza proceeds to fortify it, in the seventh chapter of the *Tractatus politicus*, by a great council, which will bring intellect to its service, and by a number of other devices. We may call this a *mixed constitution*, and it is, in effect, a mixed constitution, but Spinoza was thinking of a fortification of monarchy, and not of a mixture of different political elements. On his own theory monarchy remains, in its fortified condition, as a possible form of State—not rejected, but not preferred, even in its fortified condition, to other forms.]

11. Filmer, who rejects in his *Patriarcha* all forms of State except monarchy, regards monarchy as necessarily absolute.

French theorists of monarchy

12. Bossuet (ii, art. 1, iii, art. 2–5, iv, art. 1; v, art. 1, vi, art. 1–2, viii, art. 5, x, art. 6) argues that the people cannot be conceived apart from the Monarch, because he is *l'âme seule*, and while *les fondamentales* may secure liberty and property, they only bind the monarch [externally,] in virtue of the authority which they derive from God and reason, and never oblige him externally. A similar view appears afterwards in the Physiocrat absolutists, who simply eliminate the theocratic elements in the older theory. Cf. Mercier de la Rivière, c. 14, p. 102, c. 17, p. 129, cc. 19, 23–4 (the only rational form of State is a legal despotism, an absolute hereditary monarchy, where, the private interest of the monarch coinciding with the interests of his subjects, the mathematically evident and inevitable principles of the *ordre social* reign undisturbed).

German writers on monarchy

13. Cf. Cellarius, c. 9 ('he who is limited by fundamental laws is no longer sovereign'), Pufendorf, ii, c. 3, Biermann, c. 12, §§4–7, Becker, ii, c. 1. Mevius also (*Prudentia*, v, §§293–299) regards all the rights of the sovereign as absorbed in its single, plenary and exclusive 'representation' by the will of the Ruler, and holds that by the law of nature the potestas imperandi is necessarily una, summa, absoluta, *relata legibus et rationibus non divisa*. On the other hand the supreme authority must do nothing whereby *summa potestas sit infinita*: it must not, therefore, bring the State under a foreign yoke, alienate land, alter the fundamental laws or exercise tyranny (§30), and it must use *bona publica* only for *usus publicus*, and impose taxes only in case of necessity. Cf., in the same sense, Alberti, c. 14, §§9–10.

Horn's idea of monarchy

14. Horn, *De civ.* ii, c. 10, §§1–15. In a limited monarchy, summa potestas resides exclusively in the monarch, and it is only its 'exercise' which is limited: the monarch can therefore, in case of need, break even the rules of the constitution, which can never be anything more than a contract to which he has freely assented. The obligation imposed on him by an oath to the

constitution is only a religious obligation, and he can never be deposed, because he has no *superior*

16 Pufendorf attacks Hobbes for making the two conceptions [that of 'supreme' power, and that of 'unlimited' power] interchangeable. cf *J n n g* vii, c 6, § 13

18 *J n n g* viii, c 2, § 14, *De off hom et cit* ii, c 5, § 11, cf n 192 to § 16

17 *J n n g* vii, c 2, § 14 If *populus* is understood to signify a 'Subject' or owner of rights (*unum aliquid unum habens substantiam et eos cui soli inhæ potest*), it becomes identical with *civitas* and its will becomes identical with that of the Ruler, and thus the paradox holds good in a monarchy that *Rex est populus* But if *populus* is understood to mean the *multitudo subditorum*, as contrasted with the *homo vel consilium habens imperium*, it ceases entirely to be a unit to which any ownership of rights can be ascribed, and the theory of the 'right' of resistance, which confuses *multitudo* with *populus* and proceeds, on the basis of this confusion, to the impossible conception of a rebellion of the *civitas* against the *Rex*, is as absurd as it is seditious On the other hand individual subjects of the State continue to be the possessors of separate wills, although they are merged in a *corpus morale* with one *substantia* (*J n n g* vii, c 4, § 2, *De off hom et cit* ii, c 7, § 9), and as possessors of separate wills, they continue to be 'natural' Subjects or owners of rights, to whom the Ruler owes obligations and to whom he may do an injustice (*J n n g* vii, cc 8 9, viii, c 1, *De off hom et cit* ii, cc 9, 11) But individuals cannot appeal to any coercive sanction in support of their natural rights they must endure the misuse of the State's authority as men endure storms and bad weather. they must go into exile themselves rather than expel their ruler, but they may be competent to resist if the worst comes to the worst and the fundamental contract itself is broken (*J n n g* vii, c 8, *De off hom et cit* ii, c 9, § 4)

Pufendorf's view of popular rights

As compared with this exposition, Pufendorf's attempt to prove the possibility of an obligation existing between *optimates* and *cives* in an aristocracy is both obscure and involved in self-contradiction In dealing with this possibility, he not only invokes the argument that, although *populus* or *persona moralis extinguitur*, the *personæ physicæ* are still there he is even willing to contend that the people does not become a *multitudo dissoluta* (though it ceases to be a *persona perfecta*) after the transference of its sovereignty, and he alleges in favour of this contention the argument that 'at any rate when there is a Senate, to serve, as it were, as its head, the people forms a person' (*quos utique non esse omnis tamquam capitis vice personam constitui*, cf *J n n g* vii, c 5, § 11) [Pufendorf's view appears to be that while a people with a king as its head is not a person, a people with a Senate at its head is, and his reason may perhaps be that while there is some similarity between the people and a Senate, and while the two may both somehow be 'persons', there is a great difference between the people and a King, who is so distinct from his people that he is a unique 'person', and they in comparison are only a *dissoluta multitudo* But whatever his reason may have been, he certainly falls into self-contradiction, for after proclaiming (in the preceding paragraph) that there is only one 'State-person', he allows two to enter in an aristocracy (1) the 'person' of the *consilium habens imperium*, and (2) the 'person' of the people, with this council serving as its head]

Natural monarchy and State-property

18 *J n n g* vii, c 6, §§ 19–17 In dealing with *res publica* Pufendorf follows a similar line [to that which he follows in dealing with political

authority]: he assigns ownership of such *bona* to the *civitas qua talis*, and he ascribes to the king only the position of a 'tutor', debarring him from alienating *bona publica* except by consent of the people. *J. n. et g.* VIII, c. 5, §8, *De off. hom. et civ.* II, c. 15, §5. At the same time he regards a monarch appointed for a fixed time as something inconceivable.

19. *J. n. et g.* VII, c. 8, §§7–13, *De off. hom. et civ.* II, c. 9.

Thomasius as anarchy

20. *Instit. jur. div.* III, c. 6, §69 (definition of the State as a *persona moralis composita*, which can will and act as a unit through the Ruler), §§115–26 (on the nature and attributes of majesty), §§127–31 (on the difference between an *imperium absolutum* and an *imperium limitatum* with fundamental laws), §§132–41 (on the possible varieties in the *modus habendi*). But Thomasius prefers to call 'non-patrimonial monarchies' by the name of *status consociatus* rather than by that of *usufructuarius* (§135),* he does not consider a *monarchia temporaria* to be absolutely inconceivable (§§102–6), and he does not allow that there can ever be a right of resistance to the sovereign (§§119–20).

21. *Stat. jur. publ.* VII, c. 7, §§17–26 and 30. In a *civitas* which is not, *nec si perfecta*, constitutional limitations do not affect the *supremae potestas*, but only the *modus exercendi*.

Cundling as monarchy

22. To some extent, indeed, Cundling may be said to be nearer to the theory of Hobbes: he follows him, for example, in the interpretation he places on the original contract (cf. *supra*, pp. 60 and 108), in his conception of the Ruler as the soul of the State (cf. n. 161 to §16 above), and in the description he gives of the authority of the State (*Jur. nat.* c. 36 and *Dur.* c. 35). But he recognises contracts made with subjects as binding (*Jur. nat.* c. 12, §§43–6 and *Dur.* c. 11, §§43–6), and he limits the principle that in a mortal State the people has no right of resisting the Ruler who breaks his contract, by remarking that, all the same, no injustice is done to a tyrant when he is expelled (*Jur. nat.* c. 38, §§19–23 and *Dur.* c. 37, §§19–23).

23. The commentators on Pufendorf similarly adopt his views (e.g. Otto, Treuer, etc.), although with some reservations.

24. H. Cocceji, *Prodromus*, S. Cocceji, *Novum jur.* §§617–18, 633 (there can be no alienation of territory without the consent of the people, except in *regna patrimonialia*), and §638 (there is no right of resistance).

25. *Dur.* XIV, no. 7, *De absoluta principis potestate*, c. 3, and *Dur.* IV, no. 1, *De statibus provinciarum*, c. 1, nos. 99 sqq. and c. 4.

26. *Opusc.* II, op. 4, c. 1, §§13–15 (see n. 170 to §16 above) and §66.

27. *Grundriss*, §§5, 11, 32, 34, 35.

28. *Systema*, I, c. 3, §§5, 13, 26, IV, c. 1 (there is never a *jus resistendi*).

29. The same homage to Pufendorf's authority is also, and especially, to be seen in the treatises which describe the positive public law of the German territorial principalities.

J. H. Boehmer as sovereignty and its limits

30. Boehmer, like other thinkers of his time, regards the personality of the State as residing entirely in the *Imperans* (whether a person or a body of persons), and he makes the will and act of this *Imperans* count, externally and internally, as the will and act of all for every purpose falling within the area of the State's functions (*P. spec.* I, c. 2, §18, c. 3, §§1, 15–21). The representative 'Subject' or person accordingly possesses, as its *jus proprium et independens*, a 'majesty' which vests it with two sorts of consequential rights—the rights of free action appertaining to the state of nature (so far as external

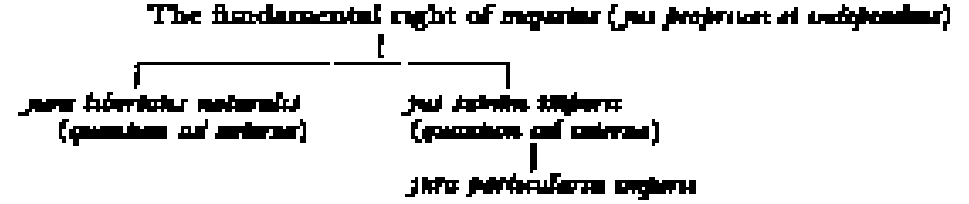
* See nos. 30 and 35 *infra*, on the difference.

relations are concerned), and the *jus summi imperii* (including all the particular powers required by the State's function), so far as internal regulation is concerned (ibid. 2, c. 4). * But though this 'majesty' is indivisible, equal at all points, all-embracing, permanent, and subject to no positive law, the sovereign who possesses it still remains bound by the *lex naturalis* (*P. gen.* c. 1, §§ 14–22). He has therefore duties as well as rights in regard to his subjects, and these duties are derived partly from the nature of civil society [as based upon natural law] and partly on specific contracts [which rest upon the same basis]. On the other hand the obligation thus arising, if it is *perfecta* for his subjects, is only *imperfecta* for him, and therefore there is never any right of coercion or resistance as against him (*P. spec.* 1, c. 2, §§ 18–21 and III, c. 2, §§ 9–25). Further, it is only individual *subditi* who confront the sovereign as 'Subjects' or owners of rights: the community of the people, as such, has no personality (ibid. III, c. 2, §§ 4–6).

Boehmer admits that there are various forms of State, 'according as the means constituted by pacts is stricter or looser'. On the one hand, there are *regna heroica*, where *imperium* has been extended, by means of contracts to that effect, beyond the limits required by the State's function; on the other, there are *regna fundata*, where the Ruler is subject to limitations imposed by contract, and there are also hereditary and elective monarchies (or *imperia patrimonialia et non patrimonialia*), though the latter must not be called by the name of *usufructuaria*† (ibid. 1, c. 3, §§ 30–6, II, c. 3, § 13, III, c. 4, § 13). But the people never has any share, *status imperii*, in the exercise of political authority, and it has therefore no legislative or judicial capacity, and no right of resistance or deposition (I, c. 3, §§ 25–6, II, c. 3, § 14, III, c. 2, §§ 4–16 and c. 4, §§ 32–3). If, therefore, the sovereign is bound by *leges fundamentales, quae pacta*, he alone can interpret such laws or pacts, and he cannot be forced to observe them (III, c. 2, § 13 and c. 4, § 16). Should he break the rules of the constitution, the people is bound to obey, and even if the *clausula nullitatis* be added to any rule—e.g. if the performance of an act of government without consultation of the representatives of the people be expressly declared to be null and void—the nullity of an act done in contravention of that proviso can only be established by the next successor, and not by the people itself (I, c. 4, § 1). The position is different, Boehmer allows, *casuaiter imperii*, since sovereignty reverts to the people in the event of such vacancy. Even here he adds a qualification (III, c. 4, pp. 9–11). Vacancy, he argues, can occur in a non-patrimonial monarchy without the consent of the people coming into play, as the result of an *alienatio regni* [in which case there will be no reversion to the people, and no consent of the people]. [See also n. 33 infra.]

31 Kestner, for example, though he follows Pufendorf in other respects

* Boehmer's argument may be illustrated by a pedigree:



† Cf. supra, n. 20, where Thomasius is quoted as rejecting this name in favour of *fidei commissaria*. For the difference between the two, see n. 35 infra, and Huber's explanation there given.

(c. 7, §§ 9 sqq.), allows the people a *jus resistendi* where there is evident tyranny (§ 19).

82. We find this view in Ludewig, 1, 1, pp. 8, c. 1, Kemmer, c. 7, §§ 11–12; Heineccius, II, §§ 147–9. On the other hand the conception of the patrimonial State is retained not only by Thomasius, Cocceji and Boehmer (see nn. 20, 24 and 30 supra), but also by Huber (1, 3, c. 2, §§ 16 sqq.), Schmier (II, c. 2, n. 2, § 3), Wolff (*Jurisp.* § 986), Nettelbladt (§ 1198), Achenwall (II, §§ 158–75), and others.

Vacancy of the throne and the rights of the People

83. J. H. Boehmer, for example, expressly treats *de juribus subditorum vacante imperio* (*P. jus.* III, c. 4). He distinguishes two cases of vacancy: (1) *totalis extinctio regnicolae*, which dissolves the 'body civil' and leaves the ground clear for a fresh act of association (§§ 2–3), and (2) simple disappearance of *imperium*, which transforms any State in which it occurs into a democracy, and thus makes the people capable of a fresh *translatio imperii* (§§ 4 sqq.). A testamentary disposition by a deceased Ruler does not bind the people in the latter of these cases, even if he were competent to alienate his kingdom (§§ 7–8).* Vacancy of *imperium* may arise through an alienation made *sine iure* (§§ 9–11), or through death (§§ 12–16), if there are no rights of succession to prevent the vacancy (§§ 17–27), or through abdication (§§ 28–31); but not through deposition (§§ 32–3). [We may remember the vote of the Convention Parliament of 1689—that James II 'has abdicated the government' (or *imperium*) and 'the throne is thereby vacant'. On the other hand we may also remember that 'abdication' here was a euphemism for deposition.]

Cf. Thomasius, *Instit.* III, c. 6, §§ 67–114, *Fund.* III, c. 6, §§ 9–10, and Doedler, II, c. 1.

Absolutist issue of popular rights

84. Filmer and Bossuet reject simultaneously both an original and a reversionary sovereignty of the people. In a similar way we find Hoen deriving the succession to the throne from the expressed or presumed will of the previous Ruler (II, c. 9, §§ 7–18), and refusing to allow any eventual reversion of *majestas* to the people, though he concedes the reversion of an original *jus aliquod*, II, c. 11, § 1 [provided there be no expressed or presumed will of the previous Ruler?]. He regards the people without a Ruler as a *corpus non mixtum*, and therefore a *cadaver* [but how, we may ask, can a *cadaver* exercise a *jus aliquod*?]

Huber on monarchy

85. Huber, *De jure civ.* 1, 2, c. 1, §§ 16, 20, c. 3, § 24, cc. 5–7, 1, 3, cc. 1–2. Even in *imperia herilia* or *despotica*, he argues, all that is added is simply an increase of the *officium* of majesty (1, 3, c. 2, §§ 10–15). Conversely, if we turn [from these absolute forms to the less absolute, i.e.] to *imperia patrimonialia* and *non patrimonialia* (and the latter of these, Huber remarks, is not a case of a mere right of usufruct, but of a limited right of property, properly to be regarded as a quasi-usufruct, and analogous to a *fides commissum* or the property of a man in his wife's dowry),† we merely find a difference in the

* Says, the will of the King of Spain in 1700, leaving his possessions to the grandson of Louis XIV, did not bind the people of Spain.

† These subtleties are fascinating. A King who rules a non-hereditary monarchy (e.g. a King of Poland in the seventeenth and eighteenth centuries) has neither a mere usufruct in an *imperium* which is the property of another, nor the full ownership of an *imperium* which is his own property. He is in a half-way house, which, however, is nearer to ownership than to usufruct. He is like a man who is the holder of what we may roughly call a quasi-property (the *fides commissum* of Roman Law),

mediat habendi of majesty [but not on 'majesty' itself], ibid. §§16–31. It is a matter of indifference, Huber adds, whether the *summa potestas* is acquired *totiusque populo*, by election or by inheritance, in perpetuity or for a period (§§32–50), and the size and style (i.e. form) of the State are matters of no significance (§§51–6). See also his *Justi Rep.* 1, cc. 3–5.

He admits limits on the sovereign.

38. *De jure civ.* 1, 2, c. 3. We must neither follow Hobbes in exaggerating sovereignty to a point at which the people becomes a mere flock of sheep (§§3–8), nor the author of the *Vindi. c. Tyr.* and Althusius and other writers in maintaining it until Rulers become nothing more than *ministri populorum* (§9). The truth is that a contract between king and people is the basis of their relations (§§17–20), and in interpreting that contract we must start neither from Hobbes' view that the people necessarily devolved the whole of its rights, nor from the view of Althusius that the people could not in any way alienate its supreme authority, but rather from the assumption that there is as one and the same time a real alienation of majesty and a reservation of popular rights which limit its exercise (§§21–51). Cf. 1, 2, cc. 4–7, 1, 3, cc. 1, 4–5, *Opera minora*, 1, no. 2, cc. 1–7.

37. *De jure civ.* 1, 3, c. 5. Fundamental laws are binding in virtue of natural [and not of positive] law: they are not to be confused with 'privileges' or *pacta cum regnis*.

His alleged rights of the People.

38. Rights of the people [as a whole, and as against the government] exist even in a democracy, where they arise from the limits imposed on majority-government (1, 2, c. 3, §§39–51): they also exist, to the same extent, in an aristocracy and a monarchy when the case is one of *imperium simplex* [ibid. c. 5]. Cf. 1, 3, c. 4.

39. *De jure civ.* 1, 3, cc. 4–5.

His theory of express fundamental laws.

40. Huber (in 1, 3, c. 5, §§23 sqq.) investigates these limits [limits imposed on the ruler by 'express fundamental laws'] in some detail. If we start from a theory which makes all limitation of the *summa potestas* purely 'constitutional' in character [i.e. dependent on express constitutional rules], we are not precluded by our basis from believing in a provision which makes the assent of the people, or an *approbatio in senatu*, a necessary condition of the validity of certain of the Ruler's acts (1, 9, c. 2, §57), nor are we, again, precluded from believing in a voluntary submission of the Ruler to private law and the civil courts (1, 9, c. 5, §§7–25). What we are precluded from holding, on that basis, is that the Ruler can really be bound by ordinary positive law, or subject to any coercion whatever, for we cannot suppose (as we should have to suppose if we tried to hold such a view) either (1) that the Ruler possesses a power of command and coercion over himself, or (2) that the people can be legally secured in the possession of such a power over him—except, indeed, at the price of a simultaneous cession by him of part of the *superiorem* (1, 9, c. 1, §§10, 14–38, 1, 9, c. 3, §§26–49). But the people possesses a right of resistance in defence of its rights against a Ruler who breaks his contract, since the question thus raised is one of natural, and not of positive law (1, 9, c. 3); and the people may even punish a tyrant

or he is like a husband who has a sum of property in his wife's dowry. Just as the former's own property is subject to the request (or 'prestative disposition') of the testator, and as the latter's property in the *dos* is subject to certain limits in favour of his wife, so the king in a non-hereditary monarchy has a property subject to the 'request' of his people, or to certain limits in favour of his people. And the people itself is a testator, or a wife, or anything else, but not a living or masculine proprietor

when once he has proceeded to forfeit his *status*, either by violating the *lex constitutiva*, or by manifestly going beyond his rights (1, 9, c. 4).

Huber identifies the State and the Ruler

41. For the identification of the person of the State with that of the Ruler, cf. the following dicta in Huber's *De jure civit.*: *rectoris per se qui habet summam potestatem personae fiunt* (1, 3, c. 6, §16), *summa potestas est quasi rector* (1, 9, c. 5, §51); *rectoris superioritas est rectoris certitudo* (1, 3, c. 2, §14 and c. 6, §26), again, because the *rector qua persona habet*, the Ruler (who is the *rector*) can bind by legislation his individual subjects, who are *diversae personae*, but he cannot bind himself (1, 3, c. 1, §§2) [since that would be a case of the same 'person' binding and being bound at the same time]. See also 1, 9, c. 5, §§69–70. It follows from Huber's argument that if the Ruler submits himself voluntarily to the courts in private-law cases, he is prosecuted and sentenced *eadem ac in omni causa*.

Yet he recognises the People as a universitas

42. Huber argues, with particular reference to the opposite opinion of Hobbes, that the people, when transferring sovereignty, *etiam quod est*, it retains the *jus personae* [after that transference], and remains a *universitas, quamvis non congregatur ut regat sed tempus futum exspectat*, and therefore it can have rights against the Ruler, and, in particular, can effectively reserve such rights [at the time of transference], or acquire them by virtue of subsequent contracts (1, 3, c. 4, §§8–83 and c. 5, §§58–9).

He would limit all governments by popular rights

43. Starting from democracy as the form of State which approaches nearest to the state of nature, Huber begins by enumerating the reservations which are implicitly made [in favour of the whole people] under a democratic constitution, when the will of the majority is made the Ruling Will (1, 2, c. 3, §§25–51 and c. 4), and he then argues for the existence of the same reservations [in favour of the whole people] in *all* forms of State, on the ground that the Ruler in any form of State has merely taken the place of the majority (ibid. c. 5). But he goes further, and he argues with some warmth in favour of express constitutional limitations on 'majesty', such as are common in monarchies, but are seldom to be found in democracies, and only subsequently in aristocracies, where they are particularly necessary (1, 3, c. 4, 4, 7, c. 1, 4, 8, cc. 2–4). In our century of oppression by princes [the seventeenth], he says, it is particularly necessary to champion the cause of liberty, but if it is particularly necessary in monarchies, it is also necessary in Republics (1, 2, c. 8).

44. [There is a contradiction involved in Huber's attempt to limit democracy by the rights of the people, because] in dealing with democracy he tries to assign to a minority the popular rights which he vindicates elsewhere for the community. He assumes the existence of two pacts (one between *populi* and *populi*, and the other between *minor pars* and *major pars*), and vindicates a *facultas resistendi* for the minority in the event of a breach of the latter of these pacts [by the majority], cf. 1, 2, c. 4, §§1–25.

45. Cf. e.g. Macrachius, 1, c. 10, §§9–16 and qu. 1–5, pp. 108 sqq. (where there is also an argument for the right of resistance in case of necessity), Felwinger, *De reg.* §§279 sqq., von Seckendorf, *Fürstenstaat*, 2, c. 4, c. 7, §12, pr., c. 3, no. 8, Moser, *Patriot. Phant.* iv, no. 51. The same tendency appears in many of the exponents of positive constitutional law.

46. Seckendorf, for example, qualifies the idea of sovereignty (though he describes it as a 'supreme and final power of command for the preservation and maintenance of the common advantage and existence') in two ways—by insisting strongly on the responsibility which attaches to sovereignty in

virtue of its being an office (*Fortsetzung*, II, c. 1; *Grundsätze*, II, cc. 5–7), and by rejecting entirely the notion that the sovereign is exempt from positive law (*Fortsetzung*, II, c. 4, §2).

Fénelon's qualification of sovereignty

Fénelon, too, though he believes in the necessity of an *autorité souveraine*, which creates the body politic by giving it unity, and brings about a pooling of powers (*multiplication des forces*) in that body, and though he adds that this authority must necessarily be 'absolute' (c. v), none the less protests against any identification of such a final and supreme authority of the last instance with mere arbitrary and unlimited power (c. xv), and he therefore attacks *despotisme des Souverains* as well as that *de la populace*, while he eulogizes a monarchy qualified and moderated by the rights of the people (c. xv)—notwithstanding the fact that he refuses to recognize any original sovereignty of the people or any right of resistance (cc. vi and x). [For the view of sovereignty as an 'authority of the last instance' cf. Loyseau, *Traité des Seigneuries*, II, §6: *la Souveraineté est la totalité et la plénitude de la puissance et ni faut que l'Estat l'avente et establisse*. Loyseau, writing about 1610, was a natural authority for Fénelon, writing towards the end of the seventeenth century. We may also note (1) that Loyseau made a distinction between sovereignty in *abstracto*, which was a *property* inherent in and attached to the State and sovereignty in *concreto*, which was the *exercise* or enjoyment of that property by a person or body of persons (though he proceeds to confuse this distinction by arguing that a king 'may acquire by prescription a property in sovereign power, and thus add property in it to exercise of it', *Traité des Offices*, II, c. 2, §§ 63–6), and (2) that it was a tradition of the French lawyers, from Bodin onwards, that even if 'majesty' were a 'supreme power, . . . exempt from laws', this only meant exemption from positive laws of the ordinary sort, and majesty was none the less subject (*a*) to 'fundamental laws' such as the Salic Law ('which are connected with majesty itself', Bodin, *De rep.* I, 88), and (*b*) to the *lex divina*, the *lex naturae* and the *lex omnium gentium communis* (ibid. 84).] *[Compare Loyseau's treatise]*

47 Cf. supra, p. 137.

Leibniz's theory of sovereignty as relation

48 Cf. Leibniz (*Caesar-Princ.*, *Praef.* pp. 399sqq.; cc. 10–12 and 26–33) on the degrees of *superior*, *supremitas* and *supremitas*, on the possible discrepancy between the internal and the external position of the sovereign, and on the possibility of division and distribution of political authority. We may note especially (c. 11, p. 360) the defence of these views against Hobbes and other writers: they are very ready, Leibniz writes, to produce a monstrum, but their conception of sovereignty is only in place in *ce Republique apres Rex Deus est* [i.e. in a State where omnipotence really exists], it does not apply to any civilized State, or even to Turkey, and it contradicts human nature. We may therefore say that Leibniz believes that the *supremitas* of the Prince is not destroyed by the existence of a contract guaranteeing rights to the people or the Estates, or even by the presence of a *lex omnipotens* [which delegates *imperium* to be exercised as a fiduciary power derived from the community], cf. c. 33.

49 Thus we find Titius, Treuer and Hert censuring Pufendorf for adopting Hobbes' identification of the *Imperator* and the *Civitas*, and similarly we find the first two of these, along with Otto, blaming him for not introducing 'fundamental laws' as limits upon the representation of the State's will by the will of the Ruler (Comm. on II, c. 6, §§ 10–11 of the *De off. hom. et cit.*, Titius, *Observ.* 159, 557).

People and Ruler as both personae

50 Hert, it is true, makes 'the person of the State' reside entirely in the *summus imperans*, but he holds none the less that a *persona ut corpus* may be attributed to the people, *quatenus primo pacto constituitur* [i e. so far as it is constituted a 'persona' and a 'body' by the original contract]. As a collective person, which comes into existence by virtue of the original contract of society, the people has *rationes suae suae imperii* [i e it is not a 'Subject' or owner of rights in anything like the same way as the Ruler], but it may acquire rights afterwards by contract or by prescription. Again the *populus conjunctus pacto primo* continues to survive even when the *pactum secundum* [i e the contract of government or subjection] is dissolved, and it has in that case to re-constitute the *pactum secundum* afresh. cf *Opusc.* I, 1, pp 288, 291, 295–8.

Schmaus regards the *summa potestas* as the soul of the State, and he makes the 'Subject' or owner of this power 'the person of the State' (II, c 1, § 1, §§ 1–9) But he also holds that the *populus collectus simplex* continues to possess a status of its own as against the Ruler. It was the original 'Subject' of sovereignty (II, c 1, § 9), sovereignty reverts to it *secundum imperio* (II, c. 3, § 1, § 1, c 4, § 8, § 3, V, c. 8, pos. 65–9), it is at all times a *universitas* capable of possessing rights (V, c 2, § 1, § 2, § 3, c 3, § 2, §§ 2–3) [He proceeds to classify those rights] (1) Like individual subjects, the community in general enjoys everywhere certain *reserved* rights (II, c 4, § 1, § 1, V, c. 2, § 1) more especially, no change of the succession, and no alienation or mortgage of any of the rights of sovereignty, can have any validity in a 'non-patrimonial' State without the consent of the people (II, c 8, § 1, §§ 2–3 and § 2, § 3) (2) The people may also acquire extensive rights in virtue of contracts or *leges fundamentales* (II, c 4, § 1, § 2, V, c. 2, § 1, nos 6 and 8)—such as, for example, the right of giving its assent to laws (III, c 2, nos 28–30), and it may similarly acquire rights by prescription (II, c. 2, § 3, § 2, nos 174–200). The *summa potestas* may thus be either 'absolute' or 'limited' [according to the degree of these popular rights] Yet even where it is limited, it still remains *summa*, although there may be certain acts of the Sovereign which have no validity without the consent of the People or the Estates, and even although a *lex commissoria* may be imposed upon him (II, c 1, § 2, § 2) The community has no right—at any rate in cases where it is not the real and true sovereign itself—to rend or depose the Ruler who has broken his contract, unless it be by way of self-defence against a Ruler who has become *hostis apertus* (II, c 4, § 2, § 2, V, c 8, § 1 and II, 3, § 1). [The rights assigned to the people in the first part of this argument would thus appear to be denied in the second part]

Heinecius, while emphasising the exclusive representation of the State by the Ruler, and insisting on the unity and indivisibility of sovereignty, yet recognises the people as possessing the collective personality of a *societas organica*, and he also admits that, besides the popular rights which are everywhere established, in all forms of State, there may also exist additional popular rights in virtue of special constitutional provisions to that effect (*Elem* II, §§ 129–149, *Praef ecclesia* 1, c 3, § 8 cf note 92 supra)

51. *Instit* §§ 979–89. *Jur nat* VIII, §§ 29–36.

52 *Instit* § 989, *Jur nat* VIII, §§ 37 sqq Even the representation of the people by the Ruler in the sphere of external relations, Wolff adds, is merely a matter of presumption, but when any different arrangement has been established by fundamental laws, that arrangement is effective only if, and so far as, it is known to other peoples (*Instit*, § 994).

53. On Wolff's distinction between *imperium abusivum* and *tirannicum*, see his *Jus nat* viii, §§666 sqq. and *Instit* § 983, and on the application of this distinction to various forms of the State, *Jus nat* loc cit §§ 791–799 and *Instit* §§990 sqq In dealing with the nature of *leges fundamentales* Wolff views them as contracts, which it is beyond the legislative competence of the Ruler to modify, but which may be altered by the people, provided that they are not entirely based on an act of voluntary self-limitation by an otherwise unlimited Ruler, and provided also that such alteration does not affect adversely the acquired rights of the Ruler or his successors (*Jus nat* loc cit §§777 sqq., and *Instit* §§984, 989, 1007, 1043) The people, in his view, has a duty of unconditional obedience, even where there is abuse of the *summum imperium*, and he regards as unpalatable any proviso which makes the duty of obedience cease in a case of bad government On the other hand, he constantly insists on the right of passive resistance, whenever any order is issued which contravenes the commands or the prohibitions of Natural Law, or whenever, in a constitutional State, the limits of the fundamental laws are violated He even regards the people as a whole, or the injured part thereof, as entitled to offer active resistance whenever an attack is made on the rights reserved to the people—on the ground that in such a case there is a reversion to the state of nature, and each must therefore protect his rights for himself (*Jus nat* loc cit §§1041–7, *Instit* §§983, 1079, *Polit* §433) *Wolff's view of popular rights*

54. *Jus nat* § 1132 *potestas civilis et imperialis penes eosdem esse solet, a quorum arbitrio dependet an, quomodo, et in quem eam transferre velint* It is only where the foundation of the State has proceeded from some third party [distinct from both people and government] that the position is different

55 Loc cit §§1135 sqq., 1153 sqq There is indeed (Nettelbladt argues) a presumption against any limitation of the Ruler by the recognition of *jura popularia* to share in the exercise of *potestas civilis*, and [still more] against any limitation of his rights by the admission of the people to the status of joint-holders of supreme authority, but there is equally a presumption in favour of a view of monarchy as merely 'usufructuary', under a system in which *jura potestatis* are vested entirely in the *princeps*, but the *jura circa potestatem* reside entirely in the *people* (§§1198–9) In all forms of State the civil power is subject, by the nature of the case, to limits and glosses, and the *Respublica* therefore confronts the *Superior* as a 'Subject' or owner of rights (§§1127, 1134) In the event of an open transgression of limits, the people has the right of revolt (§1270) The conception of sovereignty is so much attenuated in the theory of Nettelbladt that he makes more *potestas civilis* (*die Hoheit im Staat*) the criterion of the State, and even holds that the *summa potestas* (*die Souveränität*) may be subordinate thereto (§§1125–9) [If *summa potestas* can thus be 'subordinate' to *civilis potestas*, the sovereignty which is indicated by it cannot be more than the 'courtesy' title of sovereign, as when we speak of 'our sovereign Lord the King'. It is not a true *summa potestas* in the legal sense—the authority of the last instance, which finally decides] *Nettelbladt on popular rights*

56. Loc. cit §1200 the *princeps*, as a 'public person', is a person in the state of nature, who is one with his people (*una persona cum populo*) in the sphere of external relations. *Nettelbladt on the People as a moral person*

57. In a monarchy the *populus* is always a *persona moralis* distinct from the king; but in its character of a moral person the people varies—sometimes

being altogether *subditi*, sometimes retaining reserved powers, and therefore [and to that extent] remaining *in statu naturali*, sometimes possessing political authority jointly with the prince, and therefore living, along with him, in the state of nature (§ 1001). The same position also exists in an aristocracy, as between the *populus* and the *collegium optimatum* (§ 1217). In a democracy, on the other hand, the Senate is a *persona moralis subdita populo*, not in *statu naturali* more (§ 1220), as also are all the magistrates (§§ 1226sqq.)

On the Estates as a moral person

58. Loc. cit. §§ 1210–12. The Estates exercise the rights of the people 'in their nature' (whether these rights be merely the general rights *ante pactum*, or particular rights of exercising authority [apart from the prince], or rights of sovereignty* shared with the prince), and therefore they 'represent the people, and have its rights'. We have thus three separate 'Subjects' or owners of rights [the Ruler, the People, and the assembly of the Estates] who may all live in a state of nature, for the 'body of the Estates', in so far as it exercises rights of sovereignty in the name of the people, is also free from subjection [and therefore in a state of nature].

59. *Naturrecht*, pp. 240, 244, 246, 292sqq., 308sqq., 317

60. Loc. cit. p. 310

Darjes on sovereignty and its limits

61. Darjes holds that the essence of the State requires an *imperium summum* and an *imperator* (§§ 655sqq.). The content of majesty is always the same (§§ 657sqq.); the 'Subject' of majesty may be either a collective person or an individuum (§§ 747sqq.). But there are *limites imperiorum*—both the natural, which are to be found in all forms of State, and the *pactitia*, which are found in constitutional States in addition to the natural (§§ 780sqq.). Limited monarchy, where the people has only given a *consensus conditionatus*, and where the Ruler is bound by *leges fundamentales* of capitulations, is none the less monarchy, and the erection of *ordines imperii* with powers of supervision, or even the presence of a *pactum commissorium* [a *Wahlkapitulation*, pledging the monarch at the time of his election?], does not turn it into a mixed form of State (§§ 786–9).

Achenwall on constitutional types of State

62. Achenwall regards all *existentia civitatis* as based on *pacta fundamentalia*, which cannot be altered by unilateral action (n, § 109). By the principles of 'universal absolute public law', the contract of government issues in an *imperium summum plenum et ultimatum*, either of the 'people', or of a 'physical person', or of a 'moral person' (§§ 112sqq.), but by 'universal conditional public law'† the *imperium* may be limited by 'fundamental laws', and we thus find, by the side of absolute monarchy, *monarchia mixta plena* and *monarchia limitata*—the monarch, in the latter of these two varieties, being obliged to act by the consent of the people, and the people possessing either a *synagogus de facto* or a formal *co-imperium* (§§ 148sqq.)

Schedemann on the limits of majesty

63. Schedemann holds that every State requires 'a common Head', who represents the 'majesty' of the State, and is either the whole society, or some of its members, or one (1, pp. 98sqq.). Majesty, as 'the highest form of existence in the State', is not subject to any laws, but may be bound by divine commands and by the fundamental laws which it has accepted for itself by contract (1, p. 116).

* Strictly speaking, the word *Hoheit* (which is here translated as sovereignty) means something different from sovereignty in Netelbladt, being identified with *mere potestas* and distinguished from *in summum* (n. 35 *supra*, *ad fam.*). But it is difficult to render the word otherwise.

† For these elaborate classifications of *jus*, see p. 292.

Schlözer's constitutionalist theory

64. A. L. von Schlözer treats the relation of the Ruler and the People as entirely a contractual relation (pp. 95–99), which should ideally be defined in a fundamental contract made under oath (p. 102, §6), but he allows the Ruler the right to denounce the contract at any time, and he gives the People the right of denouncing it under given conditions (p. 108, §10). Though he rejects the theory that 'law should be the one and only Ruler', and though he emphasizes strongly the necessity of a 'Sovereign' or 'Ruler' who constitutes the common will, and represents the State, either as an 'individual' or as 'when *rarely* legged by a majority' (pp. 72–9, 95, 100), he none the less imposes fixed limits upon the power of this sovereign in the course of his argument (cf. p. 94, §1)—contending that he is bound by positive as well as by natural law (p. 96, §2, p. 101, §6), and that he is subject to the fundamental contract (p. 102).

Theories of resistance

65. Daries, e.g., regards the withholding of justice as causing a return to the state of nature (§739). Achenwall allows individuals only the right to emigrate, when the fundamental contract is broken; but he allows a magistrate, or an *imperium pari potestati*, the right to resist by force of arms and expel the tyrant, if the danger threatened by acquiescence in wrong is greater than the disadvantages of rebellion, §§100–7 [cf. Bentham's *Fragment of Government*, where resistance is held to be 'allowable to, if not incumbent on, every man . . . when . . . the probable mischiefs of resistance (speaking with respect to the community in general) appear less to him than the probable mischiefs of submission' (c. iv, §100), cf. also Paley's *Moral and Political Philosophy* (Book vi, c. iii)—'the justice of . . . resistance is reduced to a computation of the quantity of the danger and grievance on the one side, and of the probability and expense of redressing it on the other']

Schedemantel thinks the nation entitled, if there be real tyranny, to rise in forcible resistance, on the ground that the bond between the prince and the nation is broken by abuse of the power of the State and transgression of the limits of that power, and that the nation thus returns to the liberty and equality of the state of nature (iii, pp. 364–75).

Schlözer allows a *droit de résistance* if there be evident tyranny, along with a power of enforcing that right by coercion, deposition or punishment, 'all being in accordance with the notion of a contract in general'. But he does not think the individual justified in exercising, or the masses capable of using, this right: 'woe, therefore, to the State where there are no representatives, and happy Germany—the only land in the world where a man can take action against his ruler, without prejudice to his dignity, by due process of law, and before an external tribunal' (pp. 105–7). [Schlözer, writing in 1793, is thinking of the *Reichskammergericht* at Wetzlar, dissolved, along with the *Reich* itself, in 1806.]

The reader is also referred to the author's work on Althusius, p. 315 n. 108.

Sidney on parliament

66. *Discourses*, iii, sect. 44. The power of parliament is 'essentially and radically in the people, from whom their delegates and representatives have all that they have'. In England, however, unlike Switzerland and the Netherlands, the several counties and towns are not separate sovereign bodies, but only 'members of that great body which comprehends the whole nation', and therefore the representatives do not serve the bodies by which they are elected, but the whole nation. If these representatives could assemble of themselves [i.e. without a royal summons—a summons which, at the time when Sidney was writing (1680–3), Charles II steadily refused to

sense], they would be responsible to the nation, and the nation only. which it is impossible for them to assemble, they have only a responsibility to their consciences and to public opinion. But this great power of the representatives, instead of diminishing liberty, really maintains it. It is identical, at bottom, with the power of the electorate. The people still remains sovereign, because only the possessor of an unlimited right can give an unlimited power of representation. The reason for the people giving such power, instead of imposing 'instructions' or mandates, is simply a prudent self-restraint. [Sidney's argument, in favour of true 'national' representation and against 'instructions', is a harbinger of Burke's famous speech to the Bristol electors in 1774 (*Works*, in Bohn's edition, vol. 1, p. 447, cf. a similar passage in his *Reflections*, vol. 11, p. 457). Mr Norton, a member of one of Elizabeth's parliaments, had already argued in 1571 that in parliamentary representation 'the whole body of the realm, and the service of the same, was rather to be respected than any private regard of place or person' (Hallam, *Const. Hist.* 1, c. v, p. 267).]

67. *Discourses*, II, sects. 7, 30 (on solemn, sworn and binding contracts between the magistrates and the nation).

Sidney on the People

68. The People, Sidney argues, is the source of all authority (I, s. 30), it creates authority (II, s. 6), and it determines its limits (II, ss. 7, 30–33); it necessarily retains legislative power, even in a monarchy (III, ss. 13–14, 45–6); and it continues to be a judge above all the magistrates (III, s. 41). The ruler is an officer appointed by and responsible to the people (II, s. 5, III, ss. 1694); no obedience is due to his commands if they are unjust (III, ss. 11, 60); resistance is permissible, if he abuses his office (III, ss. 4499), and he may even be deposed (III, s. 41, cf. s. 36—'the general revolt of a nation cannot be called a rebellion'), the people too [as well as parliament] thus retains the right of free assembly (III, ss. 31, 38).

Locke on the rights of the People

69. Cf. Locke's *Second Treatise*, II, c. 10, §132, cc. 13–14. The people (or 'the community') continues to be the fountain of all powers, and retains a right of reversion therein (II, c. 11, §141, c. 19, §§220 and 243), but its 'supreme power' only expresses itself in the event of the dissolution or forfeiture of authority (II, c. 13, §149), and the legislative power is sovereign 'whilst the government subsists' (II, c. 13, §150). [Locke goes further than Gierke allows in his view of the rights of the People. In c. 10, §132, anticipating Rousseau, he argues that 'the majority, having ... the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time, and executing those laws by officers of their own appointing, and then the form of government is a perfect democracy'. Normally, we must admit, Locke regards the people as delegating its power to a 'legislative', rather than as making laws itself. Even so, as we have already had reason to notice (*supra*, n. 68 to § 16), he does not speak of a contract between people and legislative, but of a unilateral act of the people vesting a trustee or 'fiduciary' power in the legislative. It follows upon this view that, while this fiduciary legislative may be called 'supreme', or even 'the one supreme power', the people is always a super-sovereign, having another and higher 'supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them'. Thus the people comes into action, not in the presumably rare event of a breach of contract, but in the presumably more frequent event of 'action contrary to the trust'. For such an event, to judge from the analogy of the

treatment of the trustee in English *Precedents*, may be confidently expected by the trustor who is also the beneficiary of the trust—all the more as he is in addition (in Locke's theory of the political trust) the judge of its execution]

70. The people is the sovereign judge which decides whether the powers appointed by it, including the legislative power, observe their limits. If a formal organization of its rights is lacking, it can appeal to Heaven. If it has once removed the powers which have forfeited their authority, it can either content itself by simply placing authority in fresh hands, or erect an entirely new constitution. [Locke actually says, in c. 19, § 230, where he is speaking of legislative power which has been given for lives, or for any limited time, that upon reversion 'the community may dispose of it again anew into what hands they please, *and so* (not 'or') constitute a new form of government.' (The references which Gierke gives are to c. 19, esp. §§ 212, 220, 242–3. And to c. 18, §§ 199–210, but they do not support his account of Locke's views.) Nor does Gierke's phrase about the people 'appealing to Heaven if a formal organization of its rights is lacking' correspond to what Locke actually says (c. 19, § 242). There is nothing in Locke about absence of formal organization of rights: for him the community is 'presently incorporate' by the original contract of society, continues to remain in that condition, and is thus formally organized for vindicating its rights. Again, the 'appeal to Heaven' means something more definite, and more legal, than Gierke's brief quotation suggests. Locke is arguing that if a controversy arises between the prince and some of the people on a matter on which law is silent or doubtful, the proper umpire is the body of the people, who have given him his power as a trust and can therefore decide upon his use or abuse of that power. If the prince, however, declines that way of determination, 'the appeal then lies nowhere but to Heaven'—i.e. the case is carried in the last resort to the divine ordeal of battle in civil war.] *Locke on the People as sovereign judge*

71. Cf. supra, p. 108.

72. *Contr. soc.* ii, cc. 1–2, 7, 10, cc. 15–16; cf. supra, p. 112.

73. On sovereignty as inalienable, see *Contr. Soc.* ii, c. 1. Sovereignty, being nothing but the exercise of the general will, is inalienable. A contract of subjection [*pacte de gouvernement*] would mean the dissolution of the people—*il perd sa qualité de peuple*. Will simply cannot be 'transferred': the sovereign may say, 'I do will what such and such a person wills', but not, 'I shall will whatever such and such a person may will to-morrow.' *Rousseau on sovereignty*

On the indivisibility of sovereignty, see ii, cc. 6–7. The people is the only legislator: it needs to be instructed by an enlightened law-giver, because it is not always able to see the good which it always wills, but the law-giver has only the office of proposing and drafting—*le peuple même ne peut, quand il le voudrait, se dépouiller de ce droit incommunicable*.

On sovereignty as dividable, cf. iii, c. 16. A contract between people and king is inconceivable: sovereignty is dividable as well as inalienable. *Le pouvoir c'est le dépouiller de ce qu'on confie dans l'état, c'est enfin d'exécution, et crime et conflit tout entier, où ne reconnaît magistrat aucun contrat public, qui ne fît une violation de pouvoir.*

On the impossibility of representation, see iii, c. 15.

74. Government is a commission: *un simple dépositaire, simple officier du Souverain, à qui ce droit dans son sein le pouvoir dont il fait exécuter, et qu'il peut limiter, modifier ou reprendre quand il lui plaît, l'aliénation d'un tel droit étant incompatible avec la nature du corps social et contraire au but de l'association* (iii, c. 1). *On Government*

The 'institution of the government' is not a contract, but a twofold act—the passing of a law in regard to the future form of administration, and the putting of this law into effect. The fact that the political body can thus achieve an administrative act [i.e. the act of putting the law into effect] before the existence of an administration is explained by this body's astonishing conjunction of apparently contradictory properties [or, as Rousseau puts it, 'by one of those astonishing properties . . . by which it is able to unite operations which seem to be contradictory'] . . . it executes its own law *par une conversion subite de Souveraineté en Démocratie*—that is to say, by simply instituting *une nouvelle relation de tout à tout* [in which, for the moment, the citizens become magistrates], as when the English House of Commons turns itself into a committee of the whole House (III, c. 17).

76. *Contr. soc.* III, cc. 11–14, 18; cf. supra, n. 209 to § 16.

On the provisional character of the constitution

70. Ibid. III, c. 14: *à l'instant que le Peuple est légitimement assemblé en Corps Souverain, toute juridiction du Gouvernement cesse, la puissance exécutive est suspendue et le pouvoir du dernier Citoyen est aussi sacré et inviolable que celle du premier Magistrat, parce qu'où se trouve le Représenté, il n'y a plus de Représentant.* Cf. also III, c. 18: every constitution is only provisional, and all offices are revocable; regular assemblies are required, each of which must open with the putting of two questions: (1) *s'il plaît au Souverain de conserver la présente forme de Gouvernement?* (2) *s'il plaît au Peuple d'en laisser l'administration à ceux qui en sont actuellement chargés?*

77. *Contr. soc.* I, cc. 6–7; II, cc. 2, 4.

The dualism implicit in Rousseau's theory

78. Ibid. III, cc. 1–6, 16–17; supra, nn. 213 and 214 to § 16. Rousseau, of course, is not blind to the contradiction between his own theory and the actual facts of contemporary constitutional law, but he treats all existing constitutions as illegal, and without any binding force. According to his theory the moment at which this second moral person [that of the *Gouvernement*] assumes the independent ruling authority which it is capable of exercising, and tends to exercise, marks the violation of the *traité social*, the dissolution of *le grand État*, and the constitution of a new State, composed of the governors only, and excluding the citizens, who thus revert to the liberty of the state of nature, and are not obliged, though they may perhaps be compelled, to render obedience (III, c. 10).

Sieyès' modification of Rousseau's views

79. In the theory of Sieyès, for example, the person of the State is simply the community of associated individuals (cf. n. 217 to § 16), and this community, in virtue of its inalienable and illimitable sovereignty, cannot be bound either by a fundamental constitution or by law: on the contrary, it can abolish all positive law whenever it wishes, in the strength of the community-will which is the final source and supreme controller of such law, and it can create new law by the simple expression of such will (I, pp. 131–6, 143, 202 sqq.). But this omnipotence of the collective sovereign only appears in action when the nation uses its supreme right in a controversy about the basic constitution, and proceeds to form a constituent assembly by appointing extraordinary and plenipotentiary representatives (I, pp. 138–42). On the other hand, even in ordinary times, when there is no such assembly in session, the law which the nation itself has enacted controls the *corps constitué*, excluding the legislative no less than the executive, as a universally binding constitutional norm (I, pp. 127–37, II, pp. 363 sqq.; cf. also nn. 118 and 119 to § 16, supra). Cf. also Filangieri, I, cc. 1, 11, vii, c. 33.

80 Fichte lays considerable emphasis on the rule of law. In order to secure it, he postulates a government which, though it is responsible to the sovereign people, has its own independent basis, and he rejects as 'illegal' forms both democracy proper, in which the community is judge and plaintiff at the same time, and despotism in which the government is irresponsible (*Werke*, iii, pp. 151 sqq., 170 sqq.). *Fichte on the rule of law*

81 *Werke*, iii, pp. 150 sqq., 160–3, 288 sqq.

82. Ibid. iii, pp. 153 sqq., 163, 166 sqq.

83. Ibid. iii, p. 169. So long as the appointed ruling authority lives, its will is the common will, and any other will is a private will.

84 Ibid. iii, p. 170.

85 Ibid. iii, pp. 171 sqq.

86 Ibid. iii, p. 173. Fichte is not thinking here of a single large popular assembly, but of assemblies in different places, which must, however, be 'really great masses'. Such 'great masses' are necessary, in order that the force of the people may be unquestionably superior to that of executive officers (p. 177). *Fichte on massing of the constituent*

87 Ibid. iii, pp. 182 sqq. 'For people is never a rebel, for what is greater than the people? Only God!' The leaders of popular movements are presumptively rebels, but the presumption is cancelled as soon as the people follows them, and thus declares them to be in agreement with the real general will. See, to the same effect, Fichte's *Naturlehre* (of 1798), in *Werke*, iv, pp. 438 sqq. *On popular resistance*

88 Fichte speaks expressly of a 'contract of dominion', arguing that in the making of this contract the magistrates negotiate with the people as a 'party' to it, and are excluded from membership of the people in perpetuity by accepting its terms. Once they have accepted these terms, and made themselves responsible, they can neither resign their office, nor be deprived of it, except by the common consent of both parties, and they must be given a free sphere of action in promoting the general good (*Werke*, iii, pp. 163–5, 175–7). *On the contract of dominion*

89. *Werke*, iii, p. 176.

90 Once the assembled people re-enters upon its sovereignty, as 'the Community', the magistrates become merely a 'party', the citizens appear as accusers, and the executive officers as defendants. Condemnation involves the penalties of high treason and perpetual banishment, but acquittal restores the person or persons acquitted to the position of 'magistrate' (*Werke*, iii, pp. 174 sqq.). *On the magistrates and the community*

91 In his lectures on *Die Grundzüge des gegenwärtigen Zeitalters* (1804–5), Fichte detaches the State from its individual members (cf. n. 56 to § 16). It is now described as 'a nation invisible in its essence': it is 'not individuals, but their continuous relation towards one another—a relation of which the living and moving author is the activity of individuals, as they exist in space': again it is 'the result' which emerges from the union of the leadership of the governors with the strength of the governed when they follow that leadership (*Werke*, vii, pp. 136–8). In his *Rechtslehre* also [1812] he adopts throughout an impersonal view of the State, ascribing sovereignty to 'the emergent will for law and right' which is manifested in the Ruler (*Posthumous Works*, ii, p. 624; cf. *Werke*, viii, p. 157). A similar view appears in the *Staatslehre* [1813], where supreme authority is vindicated 'for the highest human reason of a given age and nation' (*Werke*, iv, pp. 444 sqq.). *Fichte's later philosophy*

93 *Esprit des lois*, xi, c. 6 legislative power inherently belongs to *le Peuple en corps* *comme dans un État libre tout homme qui est censé avoir une âme libre doit être gouverné par lui-même*

Montesquieu avoids the problem of sovereignty

94. In dealing with the theory of separation of powers (xi, c. 6), Montesquieu avoids entirely any treatment of the problem of sovereignty. In dealing with the classification of States, he speaks of the *souverain pouvoir* of the *Peuple en corps* in democracies (ii, c. 2), but so far as other forms of State are concerned he only speaks of 'government' by a minority or a single person (ii, cc. 3–5)—though he occasionally describes a king as *Souverain* (e.g. vi, c. 5). He never makes any reference whatever to the personality of the State: the point to which his attention is always directed is whether the three *sortes de Pouvoir* should be united in a single man or body of men, or divided between several.

Frederick the Great and the People

94. Frederick the Great indubitably comes very near to a theoretical recognition of the sovereignty of the people. Not only does he refer the origin of all ruling authority to a contractual act of devolution by the people, he also identifies 'People' and 'State', in contradistinction to the Ruler appointed in virtue of that contractual act, and his famous saying that the Prince is *le premier serviteur de l'État* also reappears in his writings in the form that he is *le premier domestique des peuples qui sont sous sa domination* (*Antimach.* c. 5, *Oeuvres*, i, p. 129, viii, pp. 25*n*, 9, ix, pp. 196–7). [Gierke naturally seeks to cite the great authority of Frederick the Great. But it is not clear that Frederick was doing anything except to repeat, in a literary exercise, the current maxims of the Age of Enlightenment, nor is it certain whether, in identifying People and State, he meant (1) that the State is only the People, or (2) that the People is only the State—two seemingly identical propositions which are none the less very different.] The reader is also referred to the expressions of the constitutionalist theory in Voltaire, de Mably, Blackstone, de Lolme, etc., cf. the author's work on Althusius, p. 187 n. 186.

Justi on popular rights

95. Justi regards the State as a single moral body, with a joint force and a single will (*Natur und Wesen*, § 18). In this body, it is 'the basic authority of the people' which is the source of all other authority and is constantly appearing in action itself—determining the fundamental laws of the State, and limiting and binding the ruling authority which it creates (§ 46). Only the 'use' of the common possessions and powers is devolved upon the Ruler: the *dominium eminens* (*Obergewalt*) in respect of them all remains with 'the People', or 'the whole State', of which the Ruler is the 'Representative' (§ 49). The bearer of ruling authority cannot, therefore, use his authority for purposes repugnant to its final cause, or damage its substance (§ 50), and if he attempts to do so, the people may revoke the commission which it gave (§ 47). If the Ruler cannot fulfil his commission, or if he violates the fundamental contract, his rights disappear (§§ 141–2, 145, 161). He must always 'have in view the united will of the people' (§§ 149–50): the basic authority of the people affords a presumption in favour of 'a limited ruling authority' (§ 57), but even when the Ruler is unlimited this basic authority of the people still remains in force (§§ 67, 74). See also Justi's *Grundriss*, §§ 9, 11, 15, 17, 23*n*, 29*n*, 29*n*.

Dualism of People and Ruler in his theory

96. The 'supreme active authority', once it has been appointed, is independent, and not subject to the judicial cognisance of the people, because the people is passive [i.e. a party to a contract in which it has stipulated certain conditions in its own favour] and cannot be judge in its own case

(*Natur und Wesen*, §67). While the supreme authority observes the bounds of the fundamental laws, it has the use of the whole power of the body politic, and thereby also of the powers and possessions of its individual members (§§45, 48). The Ruler and the People are the two main parts of this body, connected together by the element of law, which can only be broken by a definite breach of contract (§§108, 190–92).

97. *Natur und Wesen*, §§99sqq., 190–92.

98. The people is the source of all authority, and moreover, in the rational and only lawful and definitive State (which Kant calls the *Republik*), it is also the 'Sovereign', inasmuch as true sovereignty or ruling authority belongs to the legislature, and the agreed will of the people should be the legislative (*Works*, VI, pp. 207sqq., VII, pp. 131sqq., §§45–6). The associated people itself thus emerges, by virtue of the political contract by which it is constituted, as 'the universal Head' (VII, p. 194, §42). The *Ruler* (*rex* or *princeps*), as being the moral or physical person entrusted with executive authority, is to be regarded as the 'agent' of the people, or 'the organ of the Ruler' (i.e. of the true Ruler—the people itself). He is 'subject to the rule of law, and bound thereby, and therefore he is bound by another than himself, that is to say, by the Sovereign', who can 'take away his authority, depose him, or reform his administration' (VII, pp. 134–5, §49; p. 137, VI, pp. 292, 320). Similarly the people is the fountain of justice—though it has to exercise the right of judicial decision indirectly, through representatives chosen from and by itself (the Jury),* and, further, to leave execution to the courts of justice (VII, p. 195). Being 'the most personal of all human Rights', the sovereignty of the People is inalienable. Any contract, by which the people pledges itself to return the sovereignty it has once attained (by concluding the original political contract, which *ipso facto* constituted the political body so created sovereign over itself), is 'inherently null and void', and if any man exercises the power of sovereignty as a legislator, 'he can only have control over the people through the common will of the people, but he cannot have control over the common will itself' (VII, p. 150, §54).

Kant's theory of popular rights

99. Cf. *Works*, VI, pp. 309–30: 'an idea of the reason—that is to say, an idea such as to oblige every ruler, in enacting law, to consider it as *though* it could have proceeded from the will of the whole people, and, again, to oblige every subject, so far forth as he wishes to be a real citizen, to regard the law *as though* he had concurred in the will enacting it in the manner aforesaid: this is the touchstone of the rightfulness of all public law' (cf. above, p. 198). [We may almost say that Kant's philosophy is a philosophy of the *as though* (*als ob*), in the sense that when a thing is done 'as though' it were another thing (e.g. when law is enacted by somebody other than the people 'as though' it were enacted by the people), it becomes that other thing. The real difficulty which Kant is facing is whether a law for the general good can be enacted otherwise than by the general will. He answers that it can be.—

Kant's theory of the as though

* Kant's view appears to go beyond English practice, where the jury finds the facts on which the judicial decision is based. This distinction between the *Feststellung* of the jury and the *Aufhebung* by the *Gerichtshof* corresponds to old Germanic ideas and practices, in which the people assembled in a folk-moot judged, and a judicial officer (such as the sheriff) executes the judgment, but it does not correspond to the relations between judge and jury in England, where the jury is in no way analogous to a folk-moot, but is derived from a royal prerogatival method of 'inquisition' into the facts, through 'sworn' representatives of local knowledge and opinion picked by royal officials, leading to a decision given by a royal judge.

provided that the enactor enacts 'as though' he were the general will. We might regard that no man or body of men other than the general will can act as the general will acts—i.e. can have gone through the dialectical process of social discussion, and taken the broad general social view, which a whole society can go through and take.]

Kant not a democrat in practice

100. The people cannot 'ratiocinate effectively' about the origin of the supreme authority to which it is subject, and it must 'obey the *de facto* legislative authority, be its origin what it may'. It 'cannot, and must not, judge otherwise than as the Head of the State for the time being (*summus imperans*) may will'. The Head of the State alone is exempt from all coercive law: he is 'not a member, but the author and sustainer of the commonwealth', the one and only 'gracious sovereign Lord' in the State, and although there are norms or standards which the Ruler should observe in enacting laws, any and every law is binding on his subjects. It follows that the people can never enjoy a right of resisting the powers that be (it cannot even plead that right in case of necessity), or possess any authority to coerce or punish the Head of the State, nor can any constitutional provision be conceived, or admitted, by which a 'publicly constituted opposition' can be invoked to protect the rights of the people against the Head of the State in the event of his violation of the constitution, since any such authority would itself be the Head of the State, or would postulate the existence of a third Head of the State [to judge between it and the *summus imperans*]. True, there are 'indestructible rights of the people as against the Head of the State', but the only protection of such rights is 'liberty of the pen, the one palladium of popular rights'. See *Werke*, vi, pp. 323, 326 and 330–7, 449–50, vii, pp. 136–41, 158 *sqq.*

On this basis Kant also rejects the possibility of any alteration of the constitution by the people, and contents himself by appealing to 'the powers that be' to observe the law of Reason, which requires that they should realise a constitutional system of government and thus create the only rightful and abiding constitution, *Werke*, vii, pp. 157 *sqq.*

101. It is true that Kant believes that the 'associated people', in a constitutional State of this pattern, should not only represent the Sovereign [in the sense of representing the fixed and sovereign law of Reason], but should actually be sovereign itself, in the sense of exercising legislative authority through the deputies whom it elects, but since it cannot, in its capacity of legislative, enjoy any executive powers, or pronounce any judicial decision, the people is left completely impotent as against the other powers, *Werke*, vi, pp. 410–10, vii, pp. 131–4, 159–60.

102. Cf. *Werke*, vii, pp. 158–9, §52: 'this is the only permanent constitution of the State, in which law is self-governing and depends on no special person'. Cf. also pp. 156 and 173.

103. Cf. nn. 41 and 47 to §14.

'Mixed' and 'limited' States

104. Thus Hobbes argued that there cannot be a *mixte Republica*, because *majestas* is no more divisible or communicable than *utcitcitur Pater cum communem filiis*. Any division of the rights of supreme authority means a complete confusion and destruction of *majestas*: even in Poland (as was also the case in Scotland at an earlier date) the King is still the Sovereign, although his *modus habendi majestatem* is limited by the pact which obliges him to consult the *proceres*. *De cit.*, iii, c. iii, §3, and ii, c. ii, §8, c. iii, §5; cf. Beckmann, c. 24, §6.

105. Cf. Micraelius, 1, c. 13, §§3-9 (there is a *forma mixta*, but it only exists in the sense of a *forma temperata*, and this designation is preferable). Similarly Knichen, after giving an exhaustive account of the position of the controversy, arrives at the view that it is best to avoid the conception of a *forma mixta*, because the question is really one of *formata* (rather than of *mixta*) *respectu potestatis* (*Opus pol.* 1, c. 8, th. 8, pp. 316-20).

Fénelon also, while he rejects equally *dégénérations des Souverain et de la République*, regards a *forma mixta* as impracticable, because it involves *partage de la Souveraineté* (c. 10); and he describes, with an obvious preposseession in its favour, a system of *monarchie modérée par l'aristocratie*, in which the King needs the consent of an aristocratic chamber for legislation, and that of the people itself for the imposition of new taxes (c. 19).

106. If this line was taken [i.e. if it was argued that limited sovereignty was inconceivable, and that States with constitutional limitations upon the rights of the Ruler were only 'mixed', and not pure, forms], the result, on the basis adopted by Bodin and Hobbes and other advocates of absolutism, was simply to denominate the non-existence of such States, for on their view the real sovereign must always be either one man, or a single aristocratic council, or the people itself as a single unit, and no constitutional limits were legally binding upon that sovereign.

Arnisaeus, on the other hand, though he regards any limitation of sovereignty as inconceivable, admits the possibility of its division (cf. c. 4) to §14). Spinoza too sketches the ideal of a limited monarchy, although he considers absolute monarchy alone to be real monarchy (cf. *Tract. pol.* c. 6-7, and *supra*, n. 10 to § 17).

107. Pufendorf, *Jur. nat. et gent.* VII, cc. 4, 5, §§ 12-15, c. 6, § 13; *De off. hom. et civ.* cc. 7, 8, § 12.

108. Thomasius, *Instit. jur. div.* III, c. 4, §§32-3, 38-56, 59-61, 150-60.

109. J. H. Buchner, *Jus publ. univ.* I, c. 3, §§25-6: the mixed state, where it occurs, is in any case a *monstrum Reipublicae*, because it depends on a division of powers, and such division disrupts *pax*.

110. Hert, *Elem.* I, 11, §8.

111. Schmauss, *Jus publ. univ.* c. 4, nos. 50-55: a genuine *forma mixta*, where it occurs, is necessarily *informis*, because majestas is indivisible [and to divide it therefore destroys the *forma Reipublicae* and makes it *informis*]. All that is compatible with the concept of the State is (1) 'limitation' of majesty in regard to its *modus haberdi* and (2) the participation of others in its *administratio*.

112. Gundling, *Jur. nat.* c. 37, §§21-36, *Disc.* c. 35. Any *republica* is 'irregular', when the 'Subject' of majesty is several different persons, and not one *persona physica et moralis*, and when majesty is therefore divided, and the State is without unity and a soul or spirit. There is nothing, therefore, in a *republica mixta*, and Sidney's view is a mere chimaera, but people may all the same live happily in such a State, *per modum*, as they do in England, Germany and Poland. Cf. *Jur. nat.* c. 38, §§19-23, where Gundling argues that the people may draw the sword in a 'limited and irregular form of State', in which *status* 'antiquaque *per mores et pactum quaesitum*, but it is otherwise, he adds, in a regular form of State. *Gundling on the mixed State*

113. Heineccius, *Elementa*, II, § 198.

114. Heracke, *Spec.* 4, c. 3, §§24-5 (note the sharp distinction, in §26, between the mixed constitution and the *forma temperata*).

'Irregular' States

116 We find Hert, for example (loc. cit.), already developing [in his *Elements* of 1689] a formal scheme of *republican irregulare* which excludes five subdivisions—Despotisms, Patriarchal States, Vassal States, and Unions or Confederations, in addition to Mixed States. Schmier (3, c. 4, ss. 1–3 of his *Jus publ.* issue of 1790) distinguishes three kinds of irregular constitutions—*ex defectu finis*, *ex defectu formae*, *ex defectu mixtur*. Cf. also Gundling [in 1714], n. 119 of this section.

116 Otto's *Commentarius* on Pufendorf, § 10 on *De off. hom. et civ.* II, c. 8.

117 Titius, *Spec. jur. publ.* VII, c. 7, §§ 31–3 and 53–69. In the *civitas foederis*, we have to ascribe *majestas plenior simplex solum obligatione consortii distincta ad indivisum*, but even in such a case the State is one, and the 'Subject' of political authority is *unus, sed non solus unicus*.

Theories of partnership in sovereignty

118 See Beseld, *Diss. de statu Rep. mixto*, c. 1 (where the phrase *communio majestatis potestas* occurs), cf. also the author's work on Althusius, pp. 169 n. 198, 181 n. 170, 355 nn. 77 and 78. In using the argument that the Emperor and the Estates of Germany were only *conjunctim* [and not severally or separately] the 'Subject' of a single and indivisible sovereignty, thinkers were especially concerned to refute the attacks of Hippolithus a Lapide and Pufendorf on the prevalent theory, and to vindicate the constitution of the Empire from any taint of irregularity.

119. Huber, *Dr. inter cives*, I, 3, c. 1, §§ 21–3, c. 5, §§ 24–29, 79–81, 1, 8, c. 6. Such communities [in which sovereignty is shared] may arise in consequence of the rights of majesty being either alienated or prescriptively acquired by one of the three parties concerned—prince, nobles and people, 1, 3, c. 8, 9. While there is no possibility of applying legal coercion to a Sovereign, the application of such coercion to the *Imperium* is a conceivable thing when the people is *constitutum superiorem*, *solum pro parte*, *respectu rei*, 1, 3, c. 5, § 49.

120 For attempts to defend the mixed form of State by the doctrine of partnership in sovereignty see e.g. Cellarius, c. 3, § 95 (*conjunctim tamen*), Kestner, c. 7, §§ 5 and 8 (*in solidum*), Alberti, c. 14, § 11, H. de Cocceji, *Prodromus* (a different view appears in S. de Cocceji, § 1024), Heineccius, II, § 126, and especially Scheidemantel (1, pp. 156–62). Scheidemantel—agreeing with Pufendorf, Real, Mercier and Rousseau, as against Grotius, Arnisaeus, Piccartus, Montesquieu, Mably and Justi—attacks any division of the rights of majesty as an offence against the unity of the State, describing the appearance of such division as 'a disease', but he admits the possibility of a partnership in majesty, i.e. a participation of several 'Subjects' in the exercise of its rights.

121. Thinkers, as a rule, were shy of treating in any detail this problem of the nature of the shares [possessed by the different 'Subjects' of majesty], contenting themselves with such phrases as were suitable for describing the legal position of ownership by *gesamte Hand* in German law [cf. supra, p. 185, n. *]. There were some who assumed, in respect of systems of joint majesty, a *condominium plenum in solidum* analogous to the *condominium* of private-law groups, cf. Kestner, loc. cit., and especially Vitriarius (1, 7, §§ 4–6), who speaks of a single Right with 'Subjects' who are 'diverse and tuned', parallel to the obligation of *corea debendi* [where there are multiple debtors, but a single 'Object' owed by them all, cf. supra, p. 103, n. *]. There were others who spoke of 'ideal' shares: cf. Beseld, loc. cit., and Franzkius, *Diss. de Imp. Rep. mixta* (in Arnisaeus, III, no. 17).

122. Thus we find Huldericus ab Eyben arguing—in his *De sede Majestatis Romano-Germanorum* (*Scripta*, iii, no. 5), c. 1, §§ 31 sqq.—that in a mixed form of State several 'Subjects' together form the 'common Subject' (*universitas non majestas, sed subjectum*), but he proceeds to add that the *exercise* of supreme authority [i.e. the actual use of majesty, as distinct from majesty 'in itself' when regarded as an abstract power] may be either (1) divided among several users, or (2) managed on a joint system in some respects, but divided in others (§ 37)—the latter being the case in Germany, in so far as the authority of the territorial princes is really a case of the distribution of imperial sovereignty among different persons for separate use (c. 9) [i.e. in Germany imperial sovereignty is in some respects managed on a joint system, in which the Emperor and the Estates are associated, but in other respects it is divided among territorial princes]. *The 'shares' in the partnership*

123. Achenwall, ii, §§ 186–7.

124. Like Arnisaeus, Grotius, Leyserus, and other thinkers of previous centuries, we find Classen (ii, c. 9), Felwinger (*Dass. de Rep.* mixta, pp. 47 sqq.), and Boecler (ii, c. 9, or, cc. 1, 8), still maintaining the conception of a *forma mixta* with a real *divisio majestatis*.

124A. Thus Treuer, in commenting on Pufendorf, *De off. hom. et civ.* ii, c. 7, § 9, contends that *majestatis divisio* is generally possible and advantageous, and does not produce a *monstrum*, because *respublica perpetuam majestatis subjectam manet*.

126. Leibnitz (*Spec. demonstr. polit.* prop. 16, p. 337) argues that in dealing with the *jus majestatis*, as in dealing with any *jus*, we have to draw a distinction between *jus in se* or *potestas* and *exercitium*. On this basis we can explain *mixtura formarum*. Poland is a democracy if we look at the *jus*, but a monarchy if we look at the *exercitium summae potestatis*. *Leibnitz on the mixed State*

127. On the beginnings of the theory that the three 'powers' should necessarily be divided—a theory which may already be traced in Buchanan and Hooker and Sidney—see the author's work on Altthusius, pp. 157 n. 104, 163 n. 119, 355 n. 78. Sidney regards a 'mixed or popular government', combining all the three forms of State, as the best (c. 11, nn. 8–29), but he does not definitely bring the idea of division of powers into connection with this doctrine. Locke also does not examine the relation of the system of division of *powers*, which he postulates in ii, cc. 12–14 and 19, to the mixture of the different *forms* of which he speaks in ii, c. 10, § 132. [Gierke is here reading too much into Locke. The passages cited (ii, cc. 12–14 and 19) do not warrant the view that Locke postulates a system of division of powers—at any rate so far as their exercise is concerned. He simply sets to to distinguish, as though, between the different functions of political authority. He is dealing with the logical analysis of functions, rather than with the practical question of separation (or union) of the organs which exercise functions. Distinguishing three functions, he only remarks (1) that in practice 'the legislative and executive powers come often to be separated', because the former is not always in session, while the latter is always in action, and (2) that the executive and federative powers are 'really distinct in themselves' (the one dealing with internal administration, and the other with treaty-making and foreign policy), but 'are almost always united' in exercise (ii, c. 12, §§ 144, 147). This implies a distinction between a legislative organ which is not always in session, and a joint executive-federative organ which is always in action, but it is a distinction merely based on continuity or dis- *Division of powers* *[Locke's theory of the three powers]*

continuity of operation, and Locke's theory of the 'supreme power' of the legislative (subject always to the over-sovereignty of the community itself) is a theory which does not square with the idea of a separation of powers as necessary to liberty. On the whole, Locke believes in a united or single sovereignty, which is immediately vested in the legislative, and ultimately in the community—though he admits that where 'the executive is vested in a single person who has also a share in the legislative, there that single person, in a very tolerable sense, may also be called supreme.' But this is a guarded phrase, extorted by English conditions, and immediately qualified and modified (II, c. 13, §151), and Locke also hastens to add that 'the executive power placed anywhere but in a person that has also a share in the legislative is visibly subordinate and accountable to it' (§152).]

119. *Esprit des lois*, XI, cc. 2, 4, 6, VI, cc. 5–6.

120. Ibid. XI, cc. 4, 6. But Montesquieu is in favour of as much division of powers as possible even in simple forms of State, and he deals with the way in which it may be achieved under different constitutions, XI, cc. 7–30.

Montesquieu on division of powers

130. Montesquieu goes to the length of declaring that a constitution, in which *le peuple en corps* can draw all the powers into its own hands, is the greatest menace to liberty. XI, cc. 4, 6. In a proper State not only the judicial, but also the executive power is independent of the popular assembly or the assembly of popular representatives. *Le pouvoir arrête le pouvoir*, and the three powers can impede one another in moving, *mais comme par le mouvement nécessaire des choses elles seront contraintes d'aller, elles seront forcées d'aller de concert*, XI, cc. 4, 6.

131. Contr. soc. III, c. 2.

Rousseau's attitude to mixed constitutions

132. Ibid. III, cc. 4, 7. It depends on circumstances whether the *gouvernement mixte* is to be preferred to the *gouvernement simple*: strictly speaking, there is hardly such a thing as a *gouvernement simple*.

133. Ibid. II, c. 2. Whether we look at the 'Subject' owning, or the 'Object' owned, Sovereignty is indivisible: political theorists behave like Japanese jugglers, who cut a child into pieces, throw the pieces up into the air, and make a living child come down. *Mais sont à peu près le tours de gobelet de nos politiques: après avoir démembré le corps social, par un prestige digne de la force il rassemblent les pièces en ne sait comment.*

134. Ibid. III, c. 1: just as all voluntary action has two causes which must both be operative, *volonté* and *puissance*, so, in the body politic, there must necessarily be a distinction between *volonté* and *force*, or in other words between *puissance législative* and *puissance exécutrice*, and while the former of these must belong to the sovereign body, it need not necessarily possess the latter.

135. See n. 74 to this section, cf. also Contr. soc. II, c. 6 and III, c. 1, where the argument is pressed that legislation, being the only possible expression of the general will on general objects, is the only possible activity of the Sovereign when acting as such, while political activity of any other kind, being *action particulière*, is merely an *acte de magistrature*, even when the Sovereign itself undertakes that activity. [See n. 74 supra, on the Sovereign community turning itself into a democracy, and the citizens making themselves magistrates, for purposes of executive action.]

136. Cf. supra, n. 78 to this section.

Sagnier on division of powers

137. Such an approach to the principle of division of powers appears in Sagnier, I, pp. 283–299, 445–499, II, pp. 363–399, 371–399, and 576–615. Here

division of powers is justified by the argument that though there is only one political authority—that of the social body itself—there are different organs of that authority, based on different commissions given by the society. Sieyès also attempts to argue for a system of *checks* of powers, instead of a balance or equilibrium.

See also Fichte's *Naturrecht*, i, pp. 198–209 (*Werke*, iii, pp. 161–199). Fichte, however, subsequently rejected the idea of division of powers in his *Rechtslehre* (*Posthumous Works*, ii, p. 632).

Division of power and the mixed constitution

138. This combination of the mixed constitution and division of powers appears in Blackstone, *Commentaries* (1765), i, c. 2 *sub fin.*; in de Lolme, *The Constitution of England* (1775, first published in French in 1771); in the Abbé de Mably, *Doutes proposés aux philosophes économistes sur l'ordre naturel et essentiel des sociétés politiques* (1768), Lettre x, and *De la législation ou des principes des lois* (1776), iii, c. 9, and in other writers. [Among other writers who combine the mixed constitution and division of powers may be mentioned Paley, who in his *Principles of Moral and Political Philosophy* (1785), Book vi, c. 7, argues (1) that the British constitution is formed by 'a combination of the three regular species of government', and (2) that the security of the constitution depends on a 'balance of the constitution', or 'political equilibrium', securing each part of the legislative—King, Lords and Commons—'from the encroachments of the other parts in the exercise of the powers assigned to it'. The balance, Paley argues, is double: it is both a balance of power, and a balance of interest. Paley differs from the general continental usage in speaking of a balance or equilibrium, not of the three powers (legislative, judicature and executive), but of the three parts of the legislative. This was natural in England, where the legislative, or King in Parliament, was regarded as everything, so that any parts or divisions must necessarily be parts of it. It is that point of view which enables Paley to identify the mixed constitution with division or balance of powers, for if King, Lords and Commons are the powers divided or balanced, then—since they represent respectively monarchy, aristocracy and democracy—the constitution is a mixed constitution uniting all these three forms. It may be added that Paley's view is the general English view of his time. It is expounded by Burke in the *Thoughts on the Cause of the Present Discontents* (*Works*, in Bohn's edition, i, p. 334), and also in the *Reflections*, where the constitution is described as 'the engagement and pact of society' by which 'the constituent parts of a state are obliged to hold their public faith with each other' (*Works*, ii, p. 404). This general idea is criticised by Paine, both in his *Common Sense* of 1776 (where he assumes that 'the component parts of the English constitution' are 'the base remains of two ancient tyrannies', monarchy and aristocracy, 'compounded with some new republican materials in the persons of the commons', and thus argues that 'to say that the constitution of England is a union of three powers, reciprocally checking each other, is farcical'), and in the *Rights of Man* of 1791–2 (where in Part i, Conclusion, he criticises 'mixed government, or, as it is sometimes hideously styled, a government of this that and t'other', as a cause of corruption (because the hereditary part tries to buy up the elective) and of irresponsibility (because each part tries to shuffle off blame on the others)). It seems curious, by the way, that the English thought of the eighteenth century does not regard the judicature as a 'part' of the Constitution, or any way parallel to the other 'parts' of which we have spoken. But the reason is simple. Concentration on the King in Parliament eliminates

[Paley, Burke and Paine]

the judges, who are not, as a body, a 'part' of that organisation. At the same time we must notice that Paley, when he comes to the administration of Justice (vi, c. 8), is quite clear that it is 'the first maxim of a free State' that 'the legislative and judicial characters be kept separate', and that there should be a 'division of the legislative and judicial functions'. Similarly Burke, though he regards the King and the two Houses as the constituent parts of the State, and as jointly sovereign, also says in his *Reflections* (*Works*, ii, 478) that 'whatever is supreme in a State ought to have as much as possible its judicial authority so constituted, as not only not to depend upon it, but to serve at to balance it'. On the general theory of the parts of the constitution and separation of powers see the Report of the Committee on Ministers' Powers (Cmd. 4060), pp. 8 ff.]

The theory of the mixed constitution in Germany

139. See, e.g., Wolff, *Iuris* §§993, 1004, Darjes, §767 (but he argues, in §§785–7, that limited monarchy is not a *forma mixta*), Nettelbladt, §§ 1142, 1155–7, 1197 (who suggests, in dealing with the mixed constitution, that sovereignty can belong to several 'Subjects' at the same time in any one of three ways—(1) in *partes divisas*, or (2) *indivisa*, on a basis of joint ownership, or (3) partly divided and partly joint—and that none of these ways is absurd), and Ickstatt, *Opusc.* ii, *op.* 1, c. 1, §§18–21 (who takes the same line).

Hoffbauer (*Naturrecht*, pp. 307–14) treats mixed constitutions with special fullness. He divides them into three kinds—'limited', 'the mixed in the proper sense of the word', and 'partly limited and partly mixed'. He is the only writer who attempts, after distinguishing the different 'Subjects' of sovereignty involved, to re-unite them again in 'a moral person in the wider sense' (pp. 206, 292), but he does so by extending the conception of the moral person to a point at which it ceases even to imply the existence of a partnership among the different juxtaposed 'Subjects' (p. 190, cf. n. 190 to § 18).

140. Frederick the Great himself (*Antimach.* c. 19) had already declared that the English Constitution was more worthy to be adopted as a model than the French.

141. Justi ranks as the best constitution the form which is a 'mixture' of the three simple forms, with a 'division' and 'equilibrium' of the different 'powers', and this is the basis of his sketch of an ideally good constitution for all times and places (*Grundriss*, §§135–69, *Natur und Wesen*, §§51–61, 88–7, 142).

142. A. L. von Schlözer holds that all *Principes simplices* are a menace, and only a *Principes composita* is endurable. We must therefore mix forms of State, as a physician mixes his drugs, and a mixture of the three forms, with a division of sovereignty, is 'the best attempt of poor humanity, which anyhow must have a State'. This ideal form has been attained in England, 'but it has not been discovered by Philosophy, or Romulus, or the Earl of Leicester,* it is due to accident, guided by *Sensus*, and favoured by circumstances', pp. 144–55, §§ 93–8, p. 115, § 3.

Kant on the logic of the mixed constitution

143. Kant achieves this result by his famous comparison of the legislative, executive and judicial powers to the three terms (major premise, minor premise, and conclusion) in a practical syllogism, *Werke*, vi, pp. 418–20, vii, pp. 131–6, 139–60. The three powers are co-ordinate with one another as 'independent moral persons', but at the same time, inasmuch as none of

* Simon de Montfort?

the three can usurp any of the functions of the other two, each is also subordinated to the others, ibid. vii, p. 134. Cf. also p. 159 supra.

Continuity of public rights and duties.

144. See Pufendorf, *J. n. et g.* viii, c. 12, §§1–4 (it follows, he argues, that responsibility for past debts continues, ranks and orders still remain the same, etc.); Alberti, c. 13, §§5–9; Schmauss, n, c. 4, s. 2, §1; Locke, ii, c. 19, §§111 sqq.; Heritius, *Opusc.* i, 1, p. 296, §§11–12, ii, 9, p. 54, §§7–8; Gundling, c. 98, §§11 sqq.; Scheidemantel, iii, pp. 409 sqq.

145. Pufendorf, loc. cit. §§5–6, argues that when a State is divided into a number of States, its debts must also be divided *pro rata*. An independent colony is not, however, responsible for the debts of the mother-country, since this is a case not of alteration but of procreation. When several States unite to form an entirely new State, rights and liabilities are transferred to this new State, and when a previously independent State is made a province, the State annexing it must similarly take over its liabilities, along with its rights, as in *jus solum hereditas*. Cf. also Schmauss, loc. cit., who holds that *diuno* or *uno* does not mean the destruction of the existing political authority, but partition of it or participation in it; Heritius (*Opusc.* i, 1, pp. 298 sqq., §§9–10), who distinguishes the four cases of merger, annexation, simple adhesion, and personal union; Gundling, c. 98; Scheidemantel, iii, pp. 408–26.

On complete disintegration of the State, either through the total disappearance of its physical basis or the total dissolution of its norms, cf. Pufendorf, loc. cit. §8; Schmauss, v, c. 4, s. 2, §9; Alberti, c. 15, §10; Heri, loc. cit. p. 295, §10; Locke, ii, c. 19, §211; Rousseau, iii, c. 11.

146. Cf. nn. 126, 129, 147, 161, 168, 170, 186, 219–24, and 238 to §16, and also n. 7 to §17.

Rules for the action of a collective Ruler.

The most detailed treatment of the question [i.e. the question of the nature of the 'person of the State' when the Ruler is a collective body of persons] is to be found in Ickstatt, *Opusc.* ii, op. 1, *de jure majorum in societatem civilem constituta communitatis formandae*. He starts from the principle that a decision of the State is a *potestas totius republicae determinata de modo quodam salus publicae efficiendae*, that this determination of the will belongs to the 'active Subject' of 'supreme power', and that it is therefore achieved by the will of a 'single moral person' in a monarchy, and by the decision of a 'composite moral person', based on previous deliberation and argument, in 'polyarchical' forms of State. He proceeds, on the basis of this principle, to deal with majority-decisions both under *jus publicum universale* (c. 1) and under the public law of Germany (c. 2). See also Heineccius, i, c. 9, §§16–23.

147. This was regarded as one of the cases in which *unus homo plures personas sustinet*, cf. nn. 129, 158 and 173 to §16. See also Huber, i, 3, §§94–98, and Nettelbladt, §1194.

Public and private law.

148. Titius refuses to distinguish public and private law by the different purposes to which they are directed, 'as is generally done', he prefers to distinguish them by the different 'Subjects' of rights to which they relate. Public law relates to *Subditi constituendi*, and to *Imperantes constituendi et constituti per salus*, private law relates to *Subditi constituti*, and to *Imperantes jam constituentes principem*. Accordingly, while *Subditi constituti* in a formed and operative State [as contrasted with *Subditi* who have still 'to be constituted' when the State is in process of formation] no longer possess a *persona publica*, and have only a private personality, the Ruler always possesses a *persona duplex*, and we must always distinguish his public and his

private personality. There are, however, mixed situations (such as that presented by the private law peculiar to princely families),* and the 'private person' of the *Princeps* is not necessarily *subditus* (*Spur. per publ.* 1, c. 1, §§43–52).

148. Cf. e.g. Huber, 1, 9, c. 5, §72; Hert, *Comment. ad Off.* 1, 3, p. 52, §§4–5; Wolff, *Jurisp.* §1012 (where a distinction is drawn between *actor regis* et *proprio*).

The Ruler and his officials

149. Mevius, for example (*Prudentiae*, v, §29), and Hert (loc. cit. p. 53, §6) argue that the Ruler, and therefore the State itself, acts when the *minister summus potestatis* acts, provided that the latter are acting within the limits of their office. Schmier, on the other hand, argues altogether in terms of private law (III, c. 5, pos. 48–64, *de obligatione summae potestatis ex facto et non facto officialium*). See also Stryck, *Dissert.* IV, no. 15, *de obligatione Principis ex facto ministri*.

The inheritance of obligations by a Ruler

151. Huber, 1, 9, c. 5, §§53–72: *obligationes, quae propter respublicam contractae sunt, tenent eosque successores, non ut haeredes, sed ut capita curiae, ceteri ut quasi Curiatios*: where such obligations are concerned, there is no question of *probabilis ratio*, *usus* and the like, the only question is whether the *Imperator*, qua *personam Curiae sustinet*, has acted within 'the limits of his power'. Pufendorf, *J. n. et g.* VIII, c. 10, §8: *quasi curiae obligata*, but its obligation exists only when there is *probabilis ratio*, and does not extend to *infamia*. Schmier, II, c. 4, s. 1, §3: the question is whether the *corpus Universitatis* is bound, and this is the case when a contract has been made, *mutuo pactis et ad salutem communem*, within the sphere of the Ruler's office.

All these three writers, it should be added, seek to apply the usual rules of simple inheritance in dealing with 'patrimonial' States; it is only when they are dealing with *regna cohaerentia* or *aggregatorum* that they distinguish between inheritance of private property and succession to the Crown. Titius (IV, c. 3) opposes this point of view. He argues that when a Ruler has duly acted in the name of the *Respublica*, and thus the *Respublica* '*per caput suum* solvit', his successor incurs responsibility in all cases alike [whether the monarchy be patrimonial or non-patrimonial] for one and the self-same reason—viz. that '*respublica nihil personae monarchae adhuc durat, et nunc eiusdem adhuc manet*'. It is true that in non-patrimonial monarchies the successor does not take over his legal position from the *defunctus*, but he takes over his position, none the less, from the *curiae ipsa*. The analogy of the limited responsibility of a tenant succeeding to a fief does not hold good [in regard to a non-patrimonial monarchy]: the new tenant of the fief succeeds to a *dominus singularis*, while the new holder of the Crown succeeds to the *caput corporis liberi et adhuc durantis*, in the one case it is the *factum defuncti* which is in question, while in the other it is the *factum personae* merely. The same rule, therefore, applies to elective [or non-patrimonial] monarchies as to other forms, and exceptions [from this general rule of the successor's responsibility] can only be recognised when there has been an act of the predecessor contravening the fundamental laws—for then it can be said that *respublica non agit*—or when there has been a case of *manifesta prodigalitas* or some other special circumstance. [Roughly expressed,

* The *Hausgesetze* or dynastic rules regulating e.g. marriage.

† *Versa* = *versa in rem* = an application of money or other proceeds by the previous ruler in the way in which the new ruler succeeds, so that the new ruler benefits by such application, and may therefore be held to incur a correlative obligation. Cf. n. 89 to § 14.

the difference between Titus and his three predecessors is that they were ready to allow that the *hereditary* king of a patrimonial monarchy inherited all the rights and obligations of his predecessor in title, but held that a *non-hereditary* king was in a different position. Titus, on the contrary, contends that there is no difference between the two, because in either case the rights and obligations are really those of the immortal State, and their continuity is not affected in any way by the hereditary or elective character of the Ruler. Perhaps we shall understand the theory of the predecessors of Titus better if we assume that in their view a 'patrimonial' monarchy is not simply an hereditary monarchy: it is a monarchy in which, as Loyseau says, 'the king by title of prescription possesses or owns sovereignty', and therefore (if sovereignty be regarded as the essence of the State) owns, or is, the State (*l'État c'est moi*). On this basis the king in such a monarchy of course takes over everything alike from his predecessor—public rights equally with private, and public obligations equally with private—because there is no distinction between public and private, all public status having become the possession or property of the king. When we get to non-patrimonial monarchies, we shall have to distinguish 'private' and 'public', but if we hold the view of patrimonial monarchies just described, it will only be when we get to monarchies other than patrimonial that we shall begin to make this distinction. Titus, we may add, is really challenging the idea at the bottom of the 'patrimonial theory', at any rate by implication.]

] P. von Ludewig (*Op.* i, 1, op. 8, pp. 539–646, *De obligatione successoris ex praecedente*) puts the conception of patrimonial monarchies completely aside, and thus rejects the usual distinctions drawn by other writers. He uses, as the thread to guide him through the labyrinth, the dictum of Bakhu, that the successor is responsible if, and to the extent that, there has been action *nomine et autoritate Reipublicae, non tot mortis principum nomen immortalis* (c. 1, §8). He accordingly denies that the successor is bound in any case where the 'limits of the office and dignity' have been overstepped by his predecessor, and he therefore decides the question of the extent of the successor's responsibility, in any particular case, by the *formula supra* [which fixes 'the limits of the office and dignity'], c. 4. But even Ludewig, in the issue, falls back into a private-law point of view, cc. 5–7 [i.e. he lets drop the thread of the public-law rights and duties of the immortal *Respublica*, and goes back to terms of the private-law rights and duties of the personal ruler].

152 J. H. Boehmer (*J. spec.* 1, c. 3, § 35, *n.*, c. 3, § 16) goes to the length of making *all* responsibility [incumbent upon a successor] depend simply and solely upon hereditary succession to the *summum imp.*, and he accordingly considers *successores totale regulare* (e.g. rulers by right of election or by virtue of contract) as not intrinsically obliged, because they rule *ex novo pactorum jure*. But he adds that it is proper for such rulers to recognise any act of a predecessor which has been done *salvo officio* or has brought advantage to the State.

153 See the author's work on Athanasius, pp. 395–6. The only dispute turned on the question, what was necessary to constitute legitimation [of an irregular ruler]. At first, thinkers were generally content to answer, 'The express or tacit assent of the people'. Later, we find the advocates of popular sovereignty insisting exclusively on the necessity of an absolutely free assent of the people (e.g. Sidney, iii, s. 91, and Locke, ii, c. 16,

When the usurper becomes legitimate

§§ 175–96, c. 17, §§ 197–8), while the advocates of the sovereignty of the Ruler require, in addition, an act of renunciation by the legitimate ruler (e.g. Kestner, c. 7, §§ 20–1, H. Cocceji, *De regnorum usurpatione rege invito*, Frankfort, 1705, Schmier, II, c. 2, s. 2, § 1, nos. 82–98, Nettelbladt, §§ 1167–8, and Achenwall, II, § 98). Often, however, the mere fact of possession was allowed to confer a prescriptive title to ruling authority.

From an opposite point of view [i.e. from a point of view which does not seek to safeguard the rights of the legitimate ruler] we find Hobbes (*Leviathan*, c. 21), Gottong and J. H. Boehmer (*P. spec.* III, c. 12, § 17) declaring that the people is quit of all responsibility to the legitimate ruler as soon as he is no longer in a position to protect them, while Horn (II, c. 9, §§ 4, 21), though rejecting prescription as a title to rule, allows majesty to be extinguished by the *de facto* acquisition of majesty by a new ruler. The theory of the *fait accompli* then gains ground gradually, even among the disciples of Natural Law.

Different views of the usurper's position

154. The stricter school of thinkers continued to maintain the old theory—that any representation of the State by a usurper was impossible, that all his acts of government were void, and imposed no obligation, that refusal of obedience to him was the right and duty of every individual, and even that private persons were free to attack him as a public enemy and put him to death. We find this view not only in Althusius and the other monarchomachs, in Suarez and the rest of the Catholic writers on Natural Law, and in Bodin, Arnisaeus and their successors, but also in Huber (I, 9, c. 1, c. 5, § 51), Schmier (loc. cit.), Fénelon (who holds, c. viii, that *le Roi de Fait* and *le Roi de Droit* must be distinguished, and that the theory of obedience being due even to the *de facto* king, as *Roi de Providence*, is erroneous), H. Cocceji (loc. cit.), Nettelbladt (§ 1167) and others.

On the other hand, we find Grotius—on the ground that some sort of government is necessary—already contending that the people is obliged to obey the actual holder of political authority, in things necessary, even before there has been any legitimation by *longum tempus* or by *pactum* (I, c. 4, § 15), and he therefore limits the right of resistance to any actual ruler (ibid. §§ 16–20), just as he also holds (II, c. 14, § 14) that contracts made by a ruler during an interregnum involve the people and the subsequent legitimate ruler, at the very least, in responsibility *de in rem verso* [i.e. for expenditure incurred, as we might say, 'in connection with the estate', cf. n. 151 *supra*]. Pufendorf has a different theory: the usurper genuinely represents the State in its external relations, and he thus binds it in that respect by his donations etc., but internally his acts—his laws as well as the donations or alienations he makes—can be rescinded by the legitimate authority. *J. n. et g.* VIII, c. 12, § 4. On the theory of the *fait accompli*, the usurper represents the authority of the State at all points, even in regard to his subjects [i.e. internally no less than externally], as soon as the expulsion of the rightful owner of political authority has been achieved. Cf. Boehmer, loc. cit., and also Kant, *Werke*, VII, p. 139.

155. Horn, refusing to recognise any personality of the State, naturally ascribes the ownership of all public property to the *Princeps* alone. *De ius.* II, c. 3, §§ 5–9.

The Ruler as relation to State property

156. Cf. especially Mevius (*Prudentia*, V, § 32); Huber (who speaks of public property as being in *patrimonio civitatis*, since the *civitas* has *jus perfectum*, II, 4, c. 1, §§ 14 sqq.), Pufendorf (who regards public property as owned by the *civitas qua talis*, and considers the king as having only the rights of a

tutor thereon, so that he has no right to alienate it apart from the people, *Jus n. et g.* vol. c. 9, §§ 8, *De off. hom. et civ.* II, c. 15, §5). Titius (III, c. 7, §§ 22qq.). Wolff (who distinguishes *bona regis regni et publica* from *bona privata sua propria*, *Jus n.* § 1012), Daries (*bona publica sunt ut dominio totius civitatis, bona privata in dominio civum*, the latter partly belonging to the Prince and partly to his subjects, §§ 687–699qq.), Nettelbladt (§§ 1347–99qq.), Achenwall (II, § 173), Schedemantel (who speaks of 'the property of the whole nation', assigns 'its supreme administration' to the sovereign, but assumes a right of the whole nation to consent to its alienation, pp. 900–99qq., 933–44qq.).

Classification of State property

137. Theorists begin by distinguishing *res publicae* from *patrimonium reipublicae*, according as public property was destined for common use by all individuals (*ad usum promiscuum*) or for the immediate purposes of the State itself (*ad usum necessarium*): cf. Huber, II, 4, c. 4, §§ 24qq.; Titius, III, c. 7, §§ 3–9qq.; Daries, § 687; Schedemantel, pp. 939–99qq.

In regard to the first of these categories (*res publicae*) there was a difference of opinion. Were *res nullius* to be included without further question in the category of State-property (this was the view of Horn, loc. cit. §§ 5–9, and Titius, loc. cit. §§ 11–19qq.), or at any rate (if that were not allowed) could they be brought into this category by a declaration made by the State, in virtue of its right of majesty (the view of Gundling, c. 96, §§ 217–20, and of Schedemantel, loc. cit.)? Or did *res nullius* come to be the property of the State only in virtue of its actually exercising a right of occupation, such as it was intrinsically free to exercise, though the right might be to some extent limited by other rights of exclusive appropriation which had their basis in positive law (this is the view of Huber, II, 4, c. 1, §§ 30–39qq.; c. 3, §§ 13–25, and of Nettelbladt, §§ 1345–6)?

State-property in the strict sense (i.e. *patrimonium reipublicae*) was generally divided into property belonging to the *aerarium* and property belonging to the *fiscus* (cf. Pufendorf, loc. cit.; Gundling, c. 96, §§ 211–9; Wolff, §§ 1038–9), but Gundling remarks that there is fundamentally no difference between the two. [Some remarks may be added in elucidation. (1) The conception of *res nullius* is fully discussed by Pound, *Introduction to the Philosophy of Law*, pp. 197–99. (2) On occupation as a basis of State-property, and on the possible limitation of the State's right of occupation by positive-law rights, cf. Mommsen, *History of Rome* (Eng. trans.), III, p. 96, where (in connection with the legislation of the Gracchi) the problem is discussed how far the State's right to its 'occupied domains' could be modified by private rights, based on positive-law rules of long prescription or recent acquisition. (3) Finally, as regards the distinction between *aerarium* and *fiscus*, we may note that this really belongs to the system of dyarchy instituted by Augustus, under which the senate and the *princeps* seemed to rule concordly, and while the former had the *aerarium*, the latter had the *fiscus* as a separate treasury—both, be it noted, being public and official treasuries.]

The Ruler's domains

138. Huber distinguishes four species of property in a monarchy—*res privatae principis*, *res dominicae*, *res fiscalis* and *res aerariae*—but he admits that the second and the third are often difficult to distinguish (II, 4, c. 4, §§ 35–50). Gundling (loc. cit. §§ 213–16) and Wolff (§ 1040) both rank domains as a third species of public property, by the side of that of the *aerarium* and that of the *fiscus*, and they hold that the prince possesses a limited right of ownership in the domains, being unable to alienate it freely on account of its connection with territorial sovereignty.

Dominium included in State property

189. This is the view of Darios, §§691–4. He simply distinguishes *res fisci* and *res civitatis*, including under the former what is intended immediately for the personal support of the territorial prince [thus, of course, differs from the old Roman use of the term], and under the latter all that is directly designed for the maintenance of the State itself, and, on this basis, he allows the prince administrate only of the latter, but gives him both administrate and *jus utendi* of the former.* A similar line is taken by Achenwall (II, § 124), and more especially by Nettelbladt (§§ 1347–9), who distinguishes from the demesne [which is the property of the State] not only the *patrimonium privatum*, but also the *bona familiae quae qua privatim est* (*Haus- und Standesgüter*).

Ownership of the State's territory

190. Cf. Wolff, *Instit.* § 1125, Nettelbladt, §§ 1144–51. Only as regards patrimonial States was the conception of 'property', amounting to a full right of ownership, extended to include the whole country, but many thinkers rejected the whole idea as untenable for that very reason [i.e. they rejected the whole idea of the patrimonial State, because it involved as a consequence the King's ownership of his territory as his own property]. Cf. p. 144, supra.

Dominium eminens in Horn and other writers

191. Horn (II, c. 4) is the strongest advocate of the view that *dominium eminens* is not only *imperium*, but a *sense dominium*, a real legal property which the State has reserved for itself in distributing private property, and which signifies the whole body of the limits to which private property is subject. But see also Huber (I, 3, c. 6, §§30–53), Pufendorf (*Elem.* I, def. 5, § 5), J. H. Boehmer (I, c. 4, §§ 25–7), Saryck (*Dissert.* XIV, no. 7) and Wolff (*Instit.* § 1065).

Other views in regard to this question

192. Titius, for example, distinguishes sharply between *dominium publicum*, which only differs from *dominium privatum* in that the 'Subject' or owner is different, and *dominium eminens*, which is really *jura imperii*, and only nominally 'property' or *dominium* (III, c. 3, § 51; c. 7, § 2). Gundling argues that the basis of expropriation is not *dominium eminens*, which only belongs to the prince in a *civitas liberis* [i.e. in a patrimonial State], but *imperium eminens* (c. 36, §§ 126–9). Darios also rejects the conception of *dominium eminens* as a basis for the rights of taxation and of expropriation of *bona privata* (§§ 695–701). Cf. also Achenwall, who writes of a *jus eminens* which takes the two forms of *dominium eminens* over things and *potestas eminens* over persons (II, §§ 145–7), and Schedemantel, who holds that the rights of 'majesty' in regard to private possessions are not derived from any property vested in it, but from its superior authority, though many writers call this 'a superior property' or *eminent dominium* (pp. 560–4).

* The translator, in this clause, has inverted the statement in Gierke's text, which apparently makes Darios assign to the prince only administrate of *bona fisci*, but both administrate and *jus utendi* of *bona civitatis*.

§ 18 THE NATURAL-LAW THEORY OF CORPORATIONS

The position of the Family

1 Cf. e.g. Cellarius, *Pol.* cc. 2–8; Johannes a Felde, *Elem.* 1, c. 1; Brecker, 1, cc. 2–6; Clasen, 1, cc. 2–6; Mullerus, *Instit.* 1, cc. 2–7; Horn, *De civ.* 1, cc. 1–4; Alberti, cc. 10–14. See also Pufendorf (*J. n. et g.* vi–vii and *De off. hom. et cit.* ii, cc. 8–9), who, however, refuses to admit the Family as a separate and independent stage in the development of associations (which would set it on the same level as the three *personae morales compositae* constituted by the domestic groups of husband and wife, parent and child, and master and servant), and accordingly designates 'the most perfect society' of the State as *societas gentis*. Thomasius takes the same line [i.e. he recognises only the three domestic groups and the State as societies] in *Instit. jur. div.* iii, cc. 1–7 (cf. also c. 1, §§ 13–14, where he argues that the Family, regarded as a union of the three *societates simplices*, has no specific purpose of its own), and so does Schmoer (3, c. 2, nn. 1–4). Cf. also Praschius, §§ 6–11; Pfaurius, Bk. 1; Rachelius, 1, nnc. 15–91.

Even Wolff, although he begins with a detailed theory 'of authority and society (*Herrschaft und Gesellschaft*) in general' (*Jurisp.* §§ 949–52), is like other thinkers [i.e. in omitting all lineages and local communities], he only admits as natural-law groups (*a*) the societies constituted under the family-system (though he allows four of these—the 'marital', the 'parental', the 'magisterial' and the Family—§§ 954–97 n.), and (*b*) the State (§§ 972 sqq.). Achenwall takes exactly the same line (*Prolegg.* §§ 91 sqq. and *Pars* 11, §§ 1 sqq., where he treats of *societas in genere*, of the four *societates domesticae*, and of the State).

Thomasius on local communities as only 'parts'

2 Thomasius (loc. cit. c. 1, §§ 15–32) explicitly justifies a direct transition from the Family to the State, without any consideration of intervening groups, on the grounds (1) that a local community has no specific purpose, and (2) that a State might possibly be composed only of a single territorial community, which proves that neither *et proximum non tam a societate differunt specie ac finibus, quam ut partes a tot tale*, § 30 [i.e. local communities differ from a State, not as being a different species with their own specific purpose, but only in the way in which parts differ from the whole which they jointly constitute—that is to say, in the way of quantity. Thomasius implicitly assumes that a 'part' is the same, in kind and purpose, as the 'whole' to which it belongs]. Schmoer takes the same line, 4, c. 8, § 4, nn. 127.

3 Thomasius, *Instit. jur. div.* 1, c. 1, § 98.

4 Cf. Schmoer, v, c. 1, who speaks of *subdita composita* and *collegialia species*. See also Pufendorf, *J. n. et g.* vii, c. 2, §§ 21–2; Hertius, *Elem.* ii, 2, § 41; J. H. Boehmer, *P. spec.* ii, cc. 4–5; Schaudemantel, cc., pp. 344 sqq.

Thomasius favourable to intervening groups

5 See [as examples of a theory which admits a variety of societies, over and above the Family and the State] Menius, who enumerates in his list *societas domestica*, with its three species, the *corpus*, *pagi*, *vicus*, *turma seu regio*, *familia* (*Prodromus*, v, § 19); Micraelius, who reckons *societas domestica* (1, cc. 2–6), the *vicus* and *pagus* (c. 7, §§ 1–24), the *tribus*, *collegium*, *corpus et universitas* (ibid. §§ 25–32), *opida*, *regnum* and *imperium* (c. 8); Knichen, who includes the four 'domestic societies', *collegia*, *familiae*, and the *imperium* (1, cc. 4–6), and Beckmann, who makes two divisions—the one including the Family, *corpora*,

collegia, *systemata* and the *respublica*, the other embracing *ius*, *pax* and *ordo*, which, however, are only *partes integrantes reipublicae* (*Med* cc 3–11)

Leibniz on groups

6 Leibniz, *Deutsche Schriften*, i, pp 414–20 Leibniz starts, it is true, by enumerating only six sorts of 'natural society'—the four societies of the family-system (those of husband and wife, parent and child, and master and servant, with the addition of the household composed of these three and intended to provide for temporal needs), the civic community (the town or rural area, intended to promote temporal well-being), and the Church of God (for the purpose of eternal felicity) But when he comes to the 'classification of societies', he distinguishes equal and unequal, limited and unlimited, and simple and compound, and he adds that 'limited' societies require federations, as they cannot all attain their purpose of promoting well-being by themselves The final result is thus a system of many societies, including households, social groups (guilds or castes), villages, monasteries, orders, towns, rural areas, and finally the whole human species, which is 'also a community' when regarded as the Church of God

The State and other groups regarded as alike

7 S Cocceji, for example, in his *Nexus systema*, after giving an account of the Family (iv, c 4) and the State (c 5), expressly declares that 'the like' (*par ratio*) is true of all *corpora et universitates* (§1005), and later on, when he is dealing with the conception of the *corpus orthodoxum*, he treats the State as only a 'conspicuous example' of that type, along with the *collegium*, the *judicium* and the *familia* (iv, §§980–1) Wolff, Heineccius, Achenwall and other writers also treat corporations as the products of a like process to that which has brought the State into existence

8 See the section on *jurisprudentia naturalis generalis* *secundum* in Nettelbladt's *Systema naturae* (§§326–414), and the section on *jurisprudentia positiva generalis* *secundum* in his *Systema prudentiae positivae* (§§841–912)

9 Cf e g Danzer, *Instit. jurisp. univ.*, *Pars spec.*, sect 3–5, Heineccius, *Prol* c 1, §§4–6, Hoffbauer, *Naturrecht*, pp 186 sqq

Theories of 'concession'

10 Cf Perezius, *Jus publ* pp 318–19, M. Schoockius, *De renunciatione*, Groningen, 1664, iv, c 8, pp 835 sqq, Felwinger, *Dass. de coll et soct* pp 308 sqq, §§18 sqq, Mantica, *De magistratibus*, Venice, 1607, iv, c 4, §441, Bermann, *Med* c 10, §18, Knichen, *Opus pol* i, c 5, th 4

State control of marriage

11 Cf Horn, *De rep* iv, c 2, §14 *magistri* only can *sponsalia* people legalities *in ecclesia*, *consilio et conscientia*, *quo non superiores prosunt sed juxta ministrorum congregationis suum*, *per magistratus praesentiam reipsa invocata* See also Schoockius, loc cit pp 832 sqq, 837, 839, Felwinger, loc cit §§51–3, Mantica, loc. cit. §§444–6

State control of group-life

12 Cf Schoockius, loc cit pp 839 sqq (there can be no elections and no assembly of any kind without governmental supervision and co-operation), Felwinger, §§44–7, Mantica, iv, c 3, §§471 sqq and c 4, §§444–6 (the *Principi* must confirm *conventiones*, *coniunctiones*, *alienationes*, *expressiones*, *electiones officialium et alia ejusmodi* the utmost that is possible without the assent of the prince is the raising of a levy in an emergency, when there is danger in delay), Knichen, i, c 5, th 8–9, Boeckelmann, c 10, §18, Andler, *Jurisp* pp 102 sqq (all *statuta* of corporations require confirmation)

Myler ab Ehrenbach contends (c 5, pp 198 sqq) that territorial towns (i e towns in one of the territorial principalities of Germany) and all other territorial corporations can never appoint magistrates *proprio jure*, but must always appoint them *nomine principis territorialis* such magistrates, therefore, are subject to confirmation and supervision by the prince, and derive

all there jurisdiction from the 'ocean' of his plenitude of power within his territory, the territorial prince retains a co-ordinate jurisdiction, his *delegatus* has precedence, and his personal appearance causes the lapse of all corporate authority

Von Seckendorf, 100, has nothing to say about local communities or corporations as exercising rights of their own in a principality he only mentions them as the objects of the prince's care and supervision (II, c. 6, §9, c. 14, 10, c. 2, §5, and c 3 to c 6, §7).

13. Schoolcus, p. 898, Fehringer, §§54 sqq ; Kruchen, 2, c 3, th 15 (a corporation may be abolished not only for debit or misuse of its powers, but also *utilitatis publicae causa*), von Seckendorf, *add* 40 to II, c 6, §9 (where he argues for freedom of trade and the abolition of guilds)

14 Spinoza would abolish all *collegia* or guilds in an aristocracy, when an aristocratic State is composed of a single city (*Tract pol* c. 8, §5), but in an aristocratic State composed of a number of cities he would allow the several cities considerable independence, even though they ought to constitute union *superior* and not a mere confederation (c. 9) In a monarchy he suggests mechanical subdivisions, which he calls *familiae*, as the basis of the royal council (cc 6–7) *Attitude of Spinoza and Hume to groups*

Hume, in sketching the constitution of an ideal State (in which he refuses to follow the fantasies of Plato and More, but allows some merit to Harrington's *Oceana*), divides the country into 100 counties, and each county into 100 parishes Each parish chooses one representative, and the 100 representatives of each county choose 10 county-magistrates and a senator The 100 senators of the whole country exercise executive power the county representatives, meeting in their particular counties, 'possess the whole legislative power of the commonwealth—the greater number of counties deciding the questions, and where they are equal, let the senate have the casting vote' * In this way the advantages of a large and those of a small commonwealth may be combined (Essays, Part II, Essay XVI, *Idea of a Perfect Commonwealth*)

15 In the article *Fondation*, in vol VII, p 75, §6 of the *Encyclopédie*, Turgot vindicates for the State the right of reforming or completely suppressing all foundations The public good is the supreme law, and the State must not be deterred from pursuing it either by a superstitious regard for the intentions of the founder or by fear of the pretended rights of certain bodies *ne par la crainte de blesser les droits prétendus de certains corps, comme si les corps particuliers avaient quelques droits vis-à-vis l'état, les citoyens ont des droits, il est des droits sacrés pour le corps même de la société, ils existent indépendamment d'elle, ils en sont les détenteurs naturels et ils n'y entrent que pour se mettre sous leurs droits sous la protection de ses mêmes lois, auxquelles ils remplissent leur liberté, mais les corps particuliers n'existent point par eux-mêmes, ne peuvent rien, ils ont été formés pour la société et ils doivent cesser d'être au moment qu'ils cessent d'être utiles* *Turgot on 'particular bodies'*

16 *Contr Soc* II, c. 3 *Quand il se fait des brigues, des associations partielles aux dépens de la grande, la volonté de chacune de ces associations devient générale par rapport à ses membres et particulière par rapport à l'État, on peut dire alors qu'il n'y a plus autant de votants que d'hommes, mais seulement autant que d'associations Les différences deviennent moins nombreuses et donnent un résultat moins général* If *Rousseau's dislike of associations*

* The translator has cited Hume's own words instead of Gaylor's paraphrase, which is not quite accurate

one of these associations gains preponderance, there is no *volonté générale* at all.

17. Ibid. *Il importe donc, pour avoir bien l'énoncé de la volonté générale, qu'il n'y ait pas de société partielle dans l'État.* If there are such societies, they must be made as numerous and as equal as possible: cf. iv, c. 1.

Churches and church-property

18. The most important of the opinions expressed in the Assembly, with regard to the theoretical legal basis of secularization, are collected in Hubler's work on *Der Eigentümer der Kirchengüter* (Leipzig 1868) and in P. Janet's article on *La propriété pendant la Révolution Française* (*Revue des deux Mondes*, xxiii (1877), pp. 334–49). [See E. de Pressensé, *L'Église et la Révolution Française*, 1890.] These opinions, as a rule, start from a general view of the relation of all corporations to the State, since there was almost universal agreement about the nature of church-property as corporation-property. [Burke has a striking passage in the *Reflections* (*Works*, Bohn's edition, ii, 378) on the revolutionary view of church-property as corporation-property. 'They say', he writes, 'that ecclesiastics are fictitious persons, creatures of the State, whom at pleasure they may destroy, and of course limit and modify in every particular: that the goods they possess are not properly theirs, but belong to the State which created the fiction.' He does not seek to refute this conception of the *persona ficta*, he simply dismisses it as a 'miserable destruction of persons', and he contents himself with arguing that church-property is 'identified with the mass of private property, and that its owners have the same title of accumulated prescription as other owners'. Mackintosh, in his reply to Burke (*Vind. Gall.* sect. 1, ad finem), makes a distinction between the Church and other corporations. Other corporations are 'voluntary associations of men for their own benefit', and their property is part of the mass of private property, so that 'corporate property is here as sacred as individual'. But the Church is a peculiar corporation—'the priesthood is a corporation endowed by the country, and destined for the benefit of other men', so that it may properly be limited or modified if its possessions and powers are not used for that benefit.]

Views on the ownership of church-property in the Assembly

19. The Abbé Maury, for example, argued, on October 19, 1789, that church-property was the property of the clerical corporation, and that property of a corps was as truly property as that of individuals. It was sophistry to distinguish between the legal basis of the one sort of property and that of the other: in both cases the right of property was not prior to the law, but was created by the law, and taken as corps or as *bénéfices*, because it is to take away its *ownership*. The Abbé de Montesquiou argued to the same effect on October 21. We also find isolated attempts to defend the theory of the property-rights of institutions [i.e. to argue that even foundations or *bénéfices*, as distinct from the corps or corporation, may acquire property rights]: this was the line taken by Mounier on October 13. Another speaker, the Abbé Grégoire, in a speech of October 23, ascribed church-property to founders and their families, or to parishes and provinces. [The debate about the question, 'Who owns church-property?', is as old as the investiture-contest in the time of Gregory VII—when one side, representing the lay tradition of the *Eigenkirchenrecht* [or 'proprietary church'], answered, 'The laity (kings and magnates) who built the church and own the land on which it stands', and the other, representing the ideas of canon law, replied, 'The saint to whom the church is dedicated, and, by extension, the institution which represents the saint'. The old issue may be said to be repeated in the

French Revolution, with the nation adopting the lay tradition of the *Eigenkirchenrecht*, and challenging the canonical idea of church-property as *Anstaltsgut*.]

Mirabeau on church-property

20. This is the view which underlies the speeches of the radical orators who argued that church-property was simply the property of the State. Mirabeau in particular, in his speeches of October 31 and November 2, arrives at the conclusion that the real ownership is vested in the nation, although—or rather, because—church-property is owned by corporate bodies. For corporations do not exist, as individuals do, before the creation of civil society, and they are not, as individuals are, *hâtenur de l'ordre social*: they owe their existence entirely to the State, and they are only its shadows (*agrégations qui ne sont que son ombre*). It is the State which, at its discretion, grants or denies them the capacity of owning property, and it can also abolish them and take their property for itself. But if the possessions of a corporation are thus 'only uncertain, momentary and conditional', and even its mere continuance is altogether precarious, we must *supposer pour ces biens un maître plus vrai, plus durable et plus stable*. We find such a 'master' in the nation: *seule nul, qui doit rester dit tous du corps lorsque ce corps est détruit, est seul en lui le maître absolu et incommutable, même dans le temps que le corps existe*. Barnave, Malouet, Dupont and Le Chapelier argued in the same sense. Garat, speaking on October 24, added an historical corroboration of this view. Treilhard and Chasset were even more radical, denying altogether the existence of corporate bodies.

The argument of Thouret

21. It was in this sense that Thouret sought, on October 23 and 30, to develop the ideas of Turgot: *Les individus et les corps diffèrent par leurs droits; les individus existent avant la loi, ils ont des droits qu'ils tiennent de la nature, des droits imprescriptibles, tel est le droit de propriété; tout corps, au contraire, n'existe que par la loi, et leurs droits dépendent de la loi*. The State can thus modify or abolish corporations at will: it can withdraw their capacity for holding property, just as it gave it. *La destruction d'un corps n'est pas un homicide*: indeed, its destruction is a duty, what society needs is real owners, and we cannot consider as real owners those *propriétaires factices qui, trompant souvent, ne peuvent toucher qu'à l'usufruit. Les corps n'existent pas par eux, mais par la loi, et la loi doit maintenir l'étendue dans laquelle elle leur donnera la communication des droits des individus ... leur les corps ne sont que des instruments fabriqués par la loi pour faire le plus grand bien possible, que faut l'exercer, lorsque son instrument ne lui convient plus? Il le brise ou le modifie*.

Dupont argued in a similar sense on October 24, and Péison on October 31: Talleyrand had already done so, on the proposal for secularisation, on October 10. The terms of the decree of November 2 corresponded to this line of argument: it did not directly assign church-property to the State, it declared, *Tous les biens ecclésiastiques sont à la disposition de la Nation* [which could then use them to endow those 'real owners' (the individual peasant or bourgeois) who, on Thouret's argument, are 'what society needs'].

Sieyès on Corporations

22. In his pamphlet on the *Tiers État*, Sieyès argues that all corporations destroy the unity of the nation, which includes only individuals, and only what is equal and common in all individuals. If public officials let themselves be compelled to form *corps*, they must lose electoral rights during the term of their office; while as for ordinary citizens, it is a requirement of social order that they should not unite in corporations. It is the very acme of perversity if the legislator should himself create corporations, or should

acknowledge and confirm them when they create themselves, or should declare the most privileged and greatest of corporations, the Estates, to be parts of the National Assembly' cf *Political Writings*, 1, pp. 167–70 [Cf also Mackintosh, *Vind Gall* sect. 1: 'Laws cannot require unmixed patriotism. But ought they for that reason to foment that separation *spirit* which is its most fatal enemy?']

His defence of corporate property

23. In his *Observations sommaires sur la liberté ecclésiastique* (1789), Sieyès gives vigorous expression to the idea that, while the existence of every *corps moral* (clergy, town, hospital, college, and the like) depends on the national will, and while the abolition of a corporation must carry with it the confiscation of its property, it is none the less true that a moral body, so long as it remains such, has rights of property which are no less sacred, and no less inviolable, than those of individuals, or indeed of the nation itself—for the nation, after all, is only a moral body The State, therefore, may kill corporations, and it may become their heir by doing so, but it cannot legally declare that their property belongs to itself [during such time as they remain corporations], *Pol. Writings*, 1, pp 481–84. In his pamphlet on Tithes (1789), and in his Proposal for a provisional decree relative to the clergy (1790), Sieyès argues in the same way, ibid. 1, pp 485–98, 11, pp 89–90.

24 *Pol. Writings*, 1, pp 292 sqq (esp. p 295), 380 sqq., 509 sqq., 561 sqq.

His attitude to local communities

25 Thus he says (in his pamphlet *On Germany*, etc., 1, p. 208) that the division into *départements* is not like that into estates, fraternities and guilds: it is as different as day is from night. He defends himself from the accusation of wishing to turn France into a federation (preface to part 1, p xv), and from that of having dissolved it into an aggregate of petty republics (11, pp. 125 sqq., 135 sqq.) He always insists that the *départements* and communes continue to remain parts of one whole, even though they are recognised as separate wholes for affairs within their own sphere (1, pp 382–5, 561).

26. He mentions only the Church as a corporative element, and he departs it in terms of unreduced 'territorialism', *Naissance*, §§ 197, 213–200 [On 'territorialism', cf. n * to p 89]

Schedemantel on associations

27 Cf 1, p 253. 'We should above all things direct our attention', Schedemantel writes, 'to the societies in our territorial perambulations, for any group in the State, which has been formed by specific agreement, or by mere chance, for the pursuit of a definite object, has an influence on the government, even if it be only in an indirect way A prudent constitution will allow no secret assemblies, and it will recognise no societies as legal save those which have received the express or tacit assent of majesty ' If this is not done, there will be parties and cabals. Every group should be dissolved and punished. Liberty in England is the mother of mischief, and the Roman laws were wise No subject can or should institute societies of his own motion (11, pp. 191 sqq) Cf. also 1, pp 295 sqq., 111, pp 244, 246 [Even in England we find Paley, who was not illiberal, following a line of argument which is not dissimilar (*Moral and Political Philosophy*, VI, c. 11 ad finem)

[The sense of Paley]

'An ignorance of union, and want of communication, appear amongst the principal preservatives of civil authority, it behoves every State to keep its subjects in this want and ignorance, not only by vigilance in guarding against actual confederacies and combinations, but by a timely care to prevent great collections of men from being assembled in the same vicinity Leagues thus formed and strengthened may overawe or overthrow

the power of any State.' But Paley, writing in 1789, was probably thinking of the Gordon riots of 1780 and of 'combinations' of workers, and he would have been the last to deprecate the existence of the Tory or, for that matter, of the Whig party.]

28. Cf. I, p. 255: even permitted societies should be kept under careful supervision, they must be made to produce their rules and regulations from time to time, to render accounts, and to submit to visitation. This should particularly be the case with professedly religious societies, but it should also hold good of 'free societies', such as the East India Companies, which are never free in any but a relative sense, and must always be subject to a presumption against their being left independent. Cf. III, pp. 245–6. *As against State control*

29. A capacity for rights and duties is only allowed to a corporation as a means to the public benefit, and it is a condition of the exercise of that capacity that a corporation should act in that sense (III, pp. 292–4).

30. Cf. III, pp. 293–4, where Schedemantel requires confirmation of the by-laws of a societas, regulation of the subscriptions of their members, the due rendering of accounts, and confirmation of their appointments of officers of their own; cf. also II, pp. 204 sqq., on the necessary limitations and the proper police supervision of guilds, and III, p. 348, on the constitution, structure and government of local communities (which are instituted 'by command of the Sovereign', and must exercise their rights of legal coercion in his name).

Schedemantel totally rejects any idea of autonomy [as belonging to societies]: law is the declared will of majesty: the rules of a privileged society are merely a matter of contract between its members, and they only acquire civil obligation 'when majesty treats them with obligation' (I, pp. 164–6). Customary law, he thinks, is often really a matter of wilful disobedience: it generally arises through 'culpable heedlessness or malice'; in any case it has no validity if it contravenes reason, or the purpose of the State, or law (I, p. 225).

31. 'No good prince, however, will take it for himself except in case of necessity' (III, p. 295).

32. Thus Schedemantel includes together, under the head of public societies, not only 'colleges' [of magistrates] which have been instituted for the purpose of exercising powers of government, but also churches, academies, privileged trading companies and local communities which the government has recognized as public; and in the same way he lumps together, under the head of private societies, the privileged as well as the unprivileged, and the simple (i.e. the relations of husband and wife, parent and child, and master and servant) as well as the compound [households, fraternities, guilds], III, pp. 244–50. Elsewhere he treats schools and universities (II, pp. 189 sqq.), academies and learned societies (ibid. pp. 194 sqq.), and guilds (ibid. pp. 204 sqq.), purely from the point of view of their being 'police' institutions of the State [i.e. institutions which enable the State to supervise the behaviour of its members]. He even makes 'domestic societies' subject to the general rights of majesty under which all societies have to live and move, III, pp. 249, 294–7. *Schedemantel treats associations as State institutions*

33. In his *Staatslehre* (*Works*, IV, p. 409) Fichte remarks that the low view of the State which is commonly held may be seen, inter alia, 'in the zeal for liberty, i.e. in lawlessness of association, in the conviction that churches, schools, trade-guilds and fraternities—indeed, almost everything that cannot *Fichte's similar view*

be expressly referred to civil legislation—are not State-institutions, but 'institutions proceeding from private petitions', with which the State is only concerned in connection with its duty of protection. Fichte is especially concerned to make the guild a definite State-institution (with a fixed membership determined by the Government, and with tests of skill imposed by it, etc.), cf. his *Naturrecht*, II, p. 58 (*Werke*, III, p. 239), and his *Rechtslehre*, II, p. 555.

Kant on foundations

84. Thus we find Kant—especially in the appendix to the second edition of his *Rechtslehre*, I, no. 6 (*Werke*, VII, pp. 120–3), 'on the rights of the State in the way of inspecting perpetual foundations on behalf of its subjects'—placing a definition of the *Stiftung* in the forefront of his argument. It is 'a voluntary beneficent institution, confirmed by the State, which has been erected for the benefit of certain of its members who succeed to one another's rights until the time of its final extinction'. But [though he thus admits their continuous life,] he proceeds to explain that these 'corporations', in spite of rights of succession, and in spite of the constitution which they enjoy as *corpora spontea*, may be abolished at any time without any violation of right. When he comes to details, he applies this theory to benevolent institutions for the poor, invalids and the sick, to the Church as a 'spiritual State', to schools, to the nobility as a 'temporary guild-fellowship authorised by the State', to orders; and to foundations based on primogeniture [i.e. to what we should call entails or family settlements].

In another passage of the *Rechtslehre* (II, note 2, loc. cit. p. 142) he starts from the idea that 'there cannot be any corporation in the State, or Estate, or order, which can transmit land as owner, according to certain rules, for the exclusive use of succeeding generations, *ad infinitum*'. He proceeds to give as examples the 'order of knights' and the 'order of clergy, called the Church', but he also adds, as another and parallel example, 'pious foundations'.

85. Loc. cit. pp. 120–3, 142–3.

Kant's doctrine of voluntary association

86. It is the secularisation of 'commanderies' [the relics of the old Teutonic Order in East Prussia?], and of ecclesiastical endowments, which Kant more particularly justifies—and indeed not only justifies, but demands. Though he supports his demand by an appeal to the change in 'public opinion' which has been produced by 'popular enlightenment', it is significant that he thinks it a sufficient warrant for secularisation if the support previously given to endowments by 'popular opinion' has been withdrawn 'merely by the leaders who are entitled to speak on its behalf' [loc. cit. pp. 121–2, 142–3].

But Kant desires equally to eliminate the system of Estates, and more especially the hereditary Estate of the nobility, loc. cit. p. 123. He even denounces any separate institution or pious foundation for charity or poor-relief, arguing that the only proper system is one of State-provision, by means of regular contributions made by each generation for itself, in the form of legal and compulsory payments, loc. cit. pp. 120–1, 144. [Kant's argument—that each generation should meet its own problems, without the aid of the pious benefactions of the past—is characteristic of an age which was shaking off the yoke of a past which it supposed to be outworn, and proclaiming the right and duty of each generation *fear ex se*, cf. Paine's repeated phrase that 'each generation is competent for its own purposes', and compare also his scheme for the complete transference of all poor-relief to the State (*Rights of*

Mor., Part II, c. 5) with Kant's similar proposal. Hegel, in his *Philosophy of Law*, §§242–5, speaks of the formlessness of alms-giving and charitable institutions, and praises, in comparison, a system of obligatory general regulations and orders. He is particularly critical of the boundless charitable foundations in England.]

Pufendorf on associations

17. *J.* n. *ad g.* VII, c. 2, §§21–3. After dealing with these 'peculiar subordinate bodies', Pufendorf proceeds to treat of appointments to public offices [thus connecting associations with the working of the State].

18. Pufendorf makes an exception in favour of 'colleges' which *prohibentur abolari*, such as the Christian communities in ancient Rome. Apart from this exception, he treats as *corpora illegitima* not only bodies which are formed for inadmissible objects, but also those which have arisen *absque consensu summorum imperantium*.

Like Hobbes, he divides all *corpora* (including both the legitimate and the illegitimate) into the two species of 'regular' and 'irregular', according as there is a proper *unio voluntatum*, or some other bond of union (e.g. conspiracy produced by *affectus, spes*, ira or the like).

19. Accordingly, in a State which has grown from the union of a number of bodies, these bodies must surrender to it whatever is necessary for it: a State which allows bodies to enjoy independent rights in public matters is a State which renounces part of its *imperium* and becomes *imperium et status*.

20. While the State is entirely and absolutely represented by its Sovereign, it is otherwise with 'bodies': here acts done by the *rector* (or *rector*) who is entrusted with the *regimen corporis* can be deemed to be the acts *totius corporis* only when they fall within the corporate sphere, as duly delimited in accordance with the constitution and the laws. Outside that sphere, the agents are personally liable. Pufendorf also regards a 'protestation' against the decisions of an assembly [i.e. the defiance of a 'body' by some of its members] as permissible, and he holds that in a dispute between a corporation and its members *non corpus judex erit, sed eventus, nec corpus reus*.

21. *J.* n. *ad g.* VI, c. 1, §1: *Quemadmodum corpus humanum ex diversis membris componitur, quae si divisa, in se considerata, corporum nomen prae se ferunt—sic et omnis in numerus contubernia coarctat*.

22. Thomasius, however, confines the idea of *societas insignis* to the communion between God and man, and he divides merely human societies into *mixtae* and *separatae*. He does not, therefore, use the distinction of 'equal' and 'unequal' societies in determining the relations between the corporation and the State, cf. *Instit. jur. div.* I, c. 1, §§99–113. In a similar way we find Mollerus (*Instit.* I, c. 1) Franchius (§§6–11) and other writers, employing this distinction only in order to point out differences of *internal* structure in the two sorts of society [and not in order to explain their *external* relations to the State].

23. Cf. n. 156 to § 16, *supra*: see also Pufendorf, *Elem.* II, 6, §20 (where he applies the argument against guilds).

24. *Introd. in jur. publ. univ.*, *P. spec.* II, c. 4.

J. H. Buchner on corporate bodies

25. Loc. cit. § 7 n. *b*. If the Ruler tolerates *collegia coepta et coepta*, these bodies have *status civilis*, but if he disapproves of them, even the patent of such 'colleges' (e.g. the early Christian communities) are instantly destitute of all rights.

Their property

46. Loc. cit. §§ n. r. More especially, these 'public colleges' must render accounts to the sovereign, and they cannot dispose of their property without his consent. This is the case with *bona caudicum*, commentarium, condemnorum, *nummi et ceteraeque—quod enim aliud nisi quasi corpus publicum?*

Their power of legislation

47. Cf. II, c. 3, §§ 16–28 and c. 4, § 12. Boehmer ascribes legislative activity exclusively to the Sovereign, and he explains the legal validity of customary law, of foreign law [in cases of private international law?] and of 'statutes' [i.e. by-laws of corporations], by his having given them his approbation. He regards municipal self-government in general not as a right belonging to municipalities (*statutorum Recht*), but as a form of legislative authority delegated to magistrates *inferiores*. The by-laws of *collegia et corpora* [i.e. corporate bodies other than municipalities], in regard to their own affairs, are in his view merely *pacta* among the members, requiring, as such, subsequent confirmation by the sovereign. But the sovereign may go further: he may make even these by-laws [though they are only internal *pacta*] dependent on his previous sanction, and he is acting rightly if he does so. In any case, he has the two rights of *inspectio* and *abrogatio*: he can cancel by-laws which are an abuse, and he can, in general, prescribe the procedure to be followed in any respect.

Their power of jurisdiction

48. Cf. II, c. 5, §26, c. 4, § 12 n. *r*, c. 7, §24, c. 8, § 13. *Jurisdictio* and the power of punishment belong only to the Sovereign or his delegates. *Collegia* and *societates aequales* have no *jurisdictio* or *jus gladii*. They may appoint *arbitri* for themselves, but they can never appoint *judices* without being guilty of *majestas laesa*. They may determine by pact that there shall be certain 'conventional' punishments, but they must leave to the *Superior* the carrying of them into effect.

Their power of imposing dues on their members

49. Boehmer argues (II, c. 9) that, while all 'societies and colleges' need a 'common chest', an *administrator* [or treasurer], and subscriptions from their members, there is a difference in this respect between the equal and the unequal society: *in aequali societate obligantur membra et pacto, in inaequali et imperio*. The Sovereign alone has a right of taxation. Any person other than the Sovereign who imposes a contribution must act either *ex imperandi iudicio superiori et certo, et ex aequorum sententiam*: he can never act *no jure*. In case of necessity, however, the consent of a majority is sufficient [i.e. it counts as the *consensus nudiusvum*], and Boehmer even allows that, *impera extremae necessitatis*, a community [which would otherwise need the permission of the Sovereign] may act on its own authority—though he adds that this should rather be explained as proceeding *ex fraternia solidaria imperandi*. See n. 46 *supra*.

Their officers

50. According to II, c. 6, there can be no public office *non ab Imperante*. In order, therefore, to appoint 'magistrates' for themselves [i.e. to appoint the officers of any society to which they belong], subjects require the permission of their Ruler. If they choose *aequales*, for example, they are acting *non sua, sed Imperantis nomine*: they are therefore responsible to him, and he may deprive them of their right of appointing, and make his own nomination, if they abuse their right of choice. Indeed, the Sovereign cannot allow a right of free election without disturbing his 'majesty', and for that reason he generally requires that his sanction shall be necessary for all elections (§ 6 n. *m*). We may notice especially how Boehmer, in dealing with the duty of municipal magistrates to render accounts—a duty which, he holds, cannot be effectively abolished by any prescription or privilege to the

contrary—bases it upon the fact that the municipal magistrates really conduct their administration as public officials, *nomine Imperatoris* (§§7–8 nn. *n* and *o*). He also holds that an officer of a corporation can never be legally prevented from appealing to the Sovereign (c. 6, §9).

Their privileges

51. Cf. n, c. 3, §§56sqq., and esp. §64 n. *b*. Privileges which run counter to the public good—such as a *privilegium ne quis detur de non subditis rationes suas de suis rationibus*, or again a monopoly—are absolutely void. Privileges which may become prejudicial in altered circumstances, as so many of the *privilegia collegiorum* readily may, are subject to recall.

52. Cf. n. 46 *supra*, and see also n, c. 10 (esp. §§7 and 17–18) on the *jus Imperatoris circa dilapidatores* [i.e. in regard to *res suibus*]. But he defends himself against the reproach that he is depriving towns of the ownership of their property by his arguments (c. 6, §8 n. *a*, m, c. 9, §3 n. *e*).

Bochmer on public and private law

53. *Intend in jus publ. usus* c. 2, §§9–10. In the following section (11) he argues acutely that on that basis international law is neither *jus publicum* nor *jus privatum*, inasmuch as *actiones gentium* fall into neither of the two categories [i.e. that of 'public' and that of 'private' actions] which are required by the conception of the State, but are simply *laxiores*. [On Bochmer's argument the actions of States when regarded as powers or *gentes* in the international system (or want of system) are neither private actions, done by private citizens or private bodies or the prince in his private capacity, nor public actions, done by citizens in their public capacity or the prince in his capacity of a public person. They are *laxiores*, or indeterminate. So Bochmer seems to argue, but it is difficult to see why the actio of a *gens*, if the act is really that of the *gens* (and not, for example, that of a casual pirate in the West Indies, of English nationality, who happens to plunder a French ship), should not be regarded as an act of the *Princeps qua talis*, or of citizens *qua membra Reipublicae*. We can hardly say that the *gens* is not the State. But the use of the separate word *gens* in international law (like the use of the word 'power') has led to a divorce between the theory of international and that of internal relations, which is only slowly being abolished.]

On 'public colleges'

54. He deals (m, cc. 4 and 5) with (1) the *jus imperantium circa collegia et universitates* and (2) their *jus circa sacra*. In dealing with the former subject, he refuses to allow that 'public colleges' have anything more than the status of 'private colleges' when regarded in their nature as *universitates* and compared with the Sovereign (e.g. they have not *jura regalium*, as he has, but only *jura collegiorum*; they have not a *jus fisci*, as he has, and so forth). They are only *sic modo publica* ['public—in a way of their own'] in virtue of the Ruler having greater rights over them and their property than he has over individuals and their property. [In other words, they are public in the sense of being under public control, but not in the sense of having a public position.] Cf. m, c. 3, §5 n. *c*.

55. *Jus publicum*, as Titius uses the term, includes only the relations of the *Imperans*, as such, to his subjects.

56. Cf. e g. Darem, §§661–9.

Huber's classification of universitates

57. In the second book of his *De jure civitatis*, which is devoted to the rights of the subject, Huber proceeds—after dealing first with persons in general (s. 1, c. 1), then with the family (s. 1, cc. 2–6), and then with citizens (*Bürger*) and the differences among them (s. 2)—to treat, in sect. 3, *De jure universitatum*. Under this head he discusses the *universitas in genere* (c. 1), guilds and trading companies (c. 2), universities (c. 3), religious societies (c. 4), local

communities (c. 5), the responsibility of *magistri ac facto universitatis* (c. 6); and the hierarchy of the Roman Catholic church (c. 7). He follows a similar order in *Instit. Rep.* sect. 11.

58. *De jure* cap. 11, 3, c. 1, §§ 3 and 19. He remarks, however, that the name of *magister* is often given to bodies *quae summa sunt universitate*, and he cites the East India Companies in Holland as examples.

Their definition and their powers

59. *De jure* cap. 11, 3, c. 1, §§ 10–14, 24. Huber's full definition of the *universitas* is: *coetus non corpus abstractum aliquoque constans, sub certo regimine, personam summae potestatis, ad utilitatem communem secutus.* The rights of a universitas may be conceded (as it is in the State itself) to one or more persons, or to the majority of the members (§ 10), but the constitution must always be limited [as regards 'universities' other than the State] to the narrowest scope of action that necessity will permit, in order that the power of the State may be weakened as little as possible (§ 34). *Universitates prohibitae*, even when they are actually tolerated, exist only *de facto*, and not *de jure*, but a period of toleration has the effect of tacit approbation (§§ 26–30). Associations which are not for the real benefit of the men or the State are to be suppressed (§§ 31–3).

Their authority derived from the State

60. Huber, *De jure* cap. 11, 3, c. 6, §§ 9 and 19–20. *potestas rectoris universitatis pendet a tota universitate quod habitat a summa potestate, a qua jus suum habet universitas.* The rectors do not 'represent' the *universitas*: they have no *praerogativa* other than what is derived from the Sovereign: *quod agunt, non ut mandatum populi, sed Principis, unguidem ut*

He uses similar language in *Prael. Dig.* III, 4, no. 4. *universitates rebelliosae relaxantur* cannot appoint permanent representatives, because they are unable *modum et finem potestatis concedere suae rectoribus, sed ...quidquid habent juris id accipiunt ab ea potestate quam et summa potestas; proinde qui id genus universitatis praesunt, non representant populum universitatis, sed potestatem summam ea parte.* Corporations may therefore give an authorization in a particular matter of legal action, which has a binding effect on those who consent, but they cannot vest their officers with a general power of binding the whole corporation (which explains, *inter alia*, the *lex* 'Cantat'), cf. *De jure* cap. 11, 3, c. 6, §§ 9 and 19 and *Prael.* III, 4, no. 4. Nor can corporations devolve on their officers a *jus contrahendi* (*De jure* cap. 11, 3, c. 6, § 18), or a *jurisdictio* (ibid. § 21), for any jurisdiction that they have is derived from the State (ibid. III, 1, c. 6, § 8). Finally, they can only make by-laws if they are authorized to that effect, and subject to the sovereign's right of giving his sanction (ibid. I, 3, c. 6, §§ 5 and 19; II, 3, c. 2, §§ 25 and 29; III, 1, c. 2, §§ 14–17).

Schmier's theory of corporations

61. Schmier, *Jurisp. publ.* cap. V, c. 7, nos. 87–114, where, after an account of the *universitas* in general, there is a discussion of local communities, universities, guilds and trading companies. Schmier expressly bases the requirement of State-consensus on the ground that *regimen, imperium sive jurisdictio ad universitatem constituendam accedens aequat se ipsi fonti quae summa potestate largitur et ipsumet denum* (no. 92). When he comes to details, he makes a grant by the State the source of the corporation's right of choosing officers, administering property, imposing taxes, exercising jurisdiction, and generally enjoying autonomy and self-government, cf. V, c. 2, nos. 55–64, and also c. 3, nos. 69–79.

62. Ibid. III, c. 3, no. 20.

Similar theories

63. Cf. *e.g.* Kreittmayr, *Grundriss*, § 19. Subjects may form 'particular societies', but such societies enjoy *jura communitatis* only in virtue of the assent

of the State, and they are thus subject to a *jus supremum superiorem et directivum* on the part of the territorial prince. We may also note that even Pufendorf's ideas, and still more those of Hert, are partially in agreement with this trend in the natural-law theory of society.

64. See n. 6, supra.

65. *Iustit.* §§898–9. Wolff adds, in §849, that it is only societies whose objects are reasonable which give rise to no rights and duties.

66. *Iustit.* §846. The laws of a society are prescriptions relating to matters 'which must always be done in one way, and that only, if the purpose of the society is to be secured'. 'All societies, therefore, must have laws, and enjoy the right to make laws'; they have also the right of threatening punishment and of actually punishing offenders. Each new member promises, expressly or tacitly, that he will observe the laws, but since the laws of a society retain their authority by virtue of the consent of its members, the society has the power of abrogating or amending its laws, or of making new laws. Cf. §859. *Wolff on the inherent rights of societies*

67. Wolff finds a justification for requiring the Ruler's assent to the alienation of the property of a local community in the fact that it is incumbent upon him to see to the common interest, and, again, that he has a *dominium eminens* over such property—as indeed he has over all kinds of property (*Iustit.* §1129).

68. S. Cocceji, *Nov. syst.* IV, §1180 *commentar. tale exhibet consensu* of §205, on the principle of *par ratio* as between all *corpora et universitates* and the State [i.e. what is true of the State is equally true, or no less likely to be true, of corporations]. *Similar views in other German writers*

69. Heineccius, *Elem. jur. nat.* II, §§19–24. The basis of the State's authority over corporations is the natural-law principle that, while in every society 'the well-being of the society is the supreme law of its members', the 'utility' of the 'greater society' must take precedence, in a 'compound society', over that of the 'lesser societies' contained in it.

70. Daries, *Iustit. jurisp. univ. Prac.* §§517–23, *P. spec.* §§550–6, 674–8. He derives the existence of associations from the contract [by which they are formed], but he bases the authority [of the State] over corporations on the principle that in a 'compound society' the relation of the *subordinata* to the *subordinans societas* is like that of the *socius* to the *sociatas*, and therefore the interest of the 'greater society' takes precedence in the event of a clash of interests (§§554–599). He therefore includes among the *jura majestatis* the *jus efficendi ex societate partiali fere sublatisque curiatis nat. impedimento*, and (consequent upon that right) the further right of legitimating as 'just' such societies as are compatible with the purpose of the State, and of abolishing others as 'unjust' (§§674–91).

71. *Syst. nat.* §§327–47. A similar view reappears in the *Jurisp. par.* §899; but in §853 a distinction is drawn between (1) *jura universitatis*, whether *organica* or *contracta*, and (2) rights which belong to *magistratus constituti in universitate et consortium superiorem*, and are therefore exercised by them in the name of the State, and not in virtue of their representing the *universitas*. *Natorlibladt's theory of associations*

72. In his *Syst. nat.* Nettelbladt first classifies societies by their purposes (§348), and then proceeds to arrange them, by a variety of criteria, into *naturales et non naturales* (§349), *simplices et compositae* (§§350–1), *perpetuae et temporariae* (§352), *locales et illocales* (§353), and *aequales et inaequales* (§§354–61). *Their classification*

'Equal societies' possessing authority

78. To the category of *societates* which are *aequales* and also (if only in cases of doubt) *non potestatis*, there belong both (1) *collegia*, or *societates simplices plurium quam duorum membrorum*, and (2) *corpora*, or *societates compositae*, the members of which are themselves 'colleges' (§354). In these *collegia* and *corpora* there are present certain peculiarities—which do not, however, prevent their being included in the category of *societas aequalis*—such as a *directorium societatis* (§357), a *punctum collegium repraesentatorum* (§358), and *deputationes collegii* for particular issues (§359).

74. *Syst. nat.* §361.

The inherent rights of corporations

75. The *jura mutuae societatis* which appear in Nettelbladt's theory are the admission and exclusion of members (§§364 and 407), the appointment of *imperantes, directores* and *officiales* (§367); the power of disposition in regard to their own assets (§407), the right of meeting and making decrees (§§374 ff.), autonomy (§§398–9), a *potestas judicandi* in regard to the affairs of the society (§413), self-government, including the right of self-taxation (§407); and finally the right of disposing of the property of the society—though the property itself is [not an inherent right, as the right of disposing of it is, but] a *jus societatis statutum* (§396). Only as regards equal societies possessing *potestas* does Nettelbladt assign all these *jura mutuae societatis* to the society itself. In the case of equal societies without *potestas*, they belong to a third party; in the case of unequal societies, they belong to the *superiores* or *superior*. On the other hand, he regards the ownership of the property of the society as belonging in case of doubt—even in the two latter sorts of society [the equal society without power, and the unequal society]—to the community itself, and not to the person who wields authority (§396).

The conceptual nearly

76. In an earlier passage of his *Systema naturae*, where he is seeking to determine the nature of the *societas composita*, Nettelbladt deals with the inclusion of 'moral persons' in a higher unity as its 'members', but he draws attention to the facts (1) that it is not *all* the societies within a society which are members of it, and (2) that not *every* society whose members belong to other societies is a 'compound society' (§§350–1). He proceeds, in the same context, to distinguish between (1) the position of a *corpus* composed of *collegia* which have equal objects of their own, and (2) the position of a *collegium* divided into mere 'deputations' or sections (§359). In a later passage, where he is dealing with the theory of *mutuae societatis*, he treats in some detail of the position of 'moral persons' as members of the State (§§1588 and 1928–50).

Public societies as the large units

77. *Syst. nat.* §§1927–30, where he includes among the 'public societies which are eminently such' *collegia sive corpora ordinum* and *collegia officiorum*, but not the *collegia societatis* in a democracy.

Colleges of magistrates

78. Ibid. §§1931–4. On the other hand, those 'societies which are magistracies' [i.e. administrative or judicial Boards] may possess the *jus magistratus* itself [not as of right derived from the sovereign, but] either *jure proprio* or *jure administrationis*, and they may in addition acquire special privileges.

Public societies in the strict sense

79. Ibid. §§1935–7. In this case [i.e. as regards 'public societies strictly so called'] the place of the *jus magistratus* is taken by a *jus ad certos functiones, regimen reipublicae constituentes, stimulis adipisci corrigendi potestatis*.

Local communities

80. Ibid. §§1938–40. These *mutuae societates personarum* [such as territorial communities] may be either *ordinatae* or *inordinatae*: they may, or may not,

have magistrates of their own, and they may be governed either by a *collegium* or a *persona*. *Cercle* [the German *Kreise*, roughly analogous to our English counties] belong to this category, but 'circles' which are the member-States of a federation are themselves *quasi-Staats*.

81. Ibid. §§ 1241–2, 1247, 1250. In any case of doubt, we can only regard the society itself as the 'Subject' or owner of this authority, but an individual, or a part of the society, may also be such a 'Subject' (§ 1245). *Private sector*

82. Ibid. §§ 1245, 1247, 1249–50. Nettelbladt does not go into any further details about the extent of State-control over corporations when he is dealing with Natural Law. It is from positive law, and from such law only, that he seeks e.g. to derive the limits upon the rights of local communities, churches and families to alienate property, *Jurisp. pos.* § 909. *State-control of corporations*

83. Ibid. §§ 1249–4.

84. Ibid. §§ 1245, 1248. It goes without saying that this argument refers primarily to the position of the evangelical church in Germany.

85. Achenwall, *Jus Nat.*, *Prolog.* §§ 82, 91–7, and II, §§ 1299 ff. On this basis Achenwall too makes every contract between more than two persons for the formation of a society produce a *per sociale universum in singulos* (II, § 8), and he regards a *societas aequalis* as one in which this *per*, or social authority, remains with the whole community, and nothing more than a *praerogativa*, or a *praeceptum obligans* (in any case nothing in the nature of an *imperium*), is vested in a single person or body of persons (II, §§ 22–37). *Achenwall: the social authority of associations*

86. Hoffbauer, *Naturrecht*, pp. 190 sqq., where a distinction is drawn between 'essential' (*essentialia*) and 'accidental' (*accidentalia*) rights of societies, and where 'social laws' and 'social authority' (in its three spheres of directorial, executive and inspectorial) are treated as being essentially involved in any contract for the formation of a society. Hoffbauer also speaks of societies as having officials of their own—but not, he adds, independently of the Ruler, and he differentiates 'equal societies' in which all the members must concur from 'unequal societies' in which there is not such general concurrence. *The merit of Hoffbauer*

87. Ibid. p. 288. But Hoffbauer adds that these 'private societies' cannot employ any coercive authority to vindicate their rights against their members.

88. A. L. von Schlözer, *Allg. Staatsrecht*, p. 70, § 19, von Schlözer cites as examples 'musical clubs' and 'the Church'.

89. W. von Humboldt, *Ideen*, pp. 41 sqq., 83, 118 sqq., 125.

90. It is sufficient to refer to the way in which Mevius (*Prolegomena*, v, § 19) eulogizes 'subordinate societies' as the foundation and mainstay of the State. The most important task of politics, he urges, is concerned with *bona fundamentalia* and with *corporum, collegiorum, sodalium formatio*, the prosperity of civil society and that of its contained groups are mutually dependent on one another; and there must be a happy mean between the independence of corporate bodies and their subjugation to the political Whole. On the basis of these ideas he will not refuse liberty of meeting and association *simpliciter*, but only when there are *causae publicae, curae imperantium* [illegible] *vitae* (v, § 26). We may also remember the views of Leibnitz [cf. *supra*, n. [illegible] 6]. *Mevius: as praise of groups*

91. Montesquieu, it is true, regards the monarch as [illegible] source of all authority, but he also believes that constitutional government [illegible], and therefore true monarchy, is impossible unless authority is diffused through *corpora superiorum*, and thus made, as it were, to flow into a Delta of *potestates intermediae*

Montesquieu on the need of intervening powers between the State and its subjects

subordonnés et dépendants. There is therefore need for the prerogatives *du Seigneur, du Clergé, de la Noblesse et des Villes*, as well as for political bodies (*i.e. parlements*) to declare and preserve the laws (*dépôt des lois*). Any destruction of these intervening powers must produce, if not a Republic, at any rate a despotism, as was shown, for example, in the case of Law's operations in France [1716–20] and in the conduct of Ferdinand of Aragon. See the *Esprit des lois*, II, c. 4; cf also III, c 7, V, cc 9–11 (where Richelieu is criticised), VI, c 1 and VIII, c 6, and cf the argument, in V, cc 14–15, that despotism, as distinguished from monarchy, is based on uniformity, equality, centralisation and the lack of all qualifying and moderating elements

Moser's eulogy of the old Germanic Groups

92 We need only refer to the account which Moser gives in his *Patriotische Phantasien* of the struggle of towns and guilds and leagues for liberty [I, nos. 43, 53, 54], and to his glorification of the Hansa (I, no 45, III, no 49) In the course of this glorification he hazards the remark that if 'the towns and guilds and leagues' had won the day in their struggle with the territorial principality, there would be sitting to-day at Ratisbon, 'side by side with an magnificent Upper House a united body of associated towns and communities for dealing with the laws' which their forefathers once imposed on all the world, and there 'it would not be Lord Clive, but a counsellor of Hamburg, who would be issuing his commands on the Ganges' (I, no 49).

We may also note Moser's historical accounts of the glory and the decline of fraternities and guilds [I, nos. 2, 4, 7, 32, 48, 49, II, nos 32–5], and, more especially, his disapproval of the attack made upon them by the Recess of the Imperial Diet of 1731 (particularly in regard to the obligations of honour* imposed by craft-guilds, I, no 49) We may equally note his general derivation of the constitution of the [German] territory, or *Land*, from a union of the 'Fellowship' type between free proprietors of estates, followed by an analogous process of Fellowship-formation among manumitted serfs and freemen who were not proprietors (In this last connection there are several passages in Moser which deserve notice; e g in III, no 34, he refers to the institution, by lords of manors, of 'a mutual protection society and articles of fraternity' among the peasantry, who then institute 'articles as between themselves' for their own domestic concerns † Again, in III, no 66, he treats of 'the origin and advantage of what are called *Hofes*, *Estates* and *Hofes*' among free men who have not a plot of land of their own cf p 353, where he remarks that 'such a *Hofe* was something in the nature of a guild chartered by the State, which could freely pass a rule about itself, and by such means maintain the rights of free men', cf also IV, nos 63–4)

Finally, we may also refer to Moser's account of the origin of territorial Estates from leagues and confederations, and of their development into a body which represented the whole territory as a *Landschaft* [or local Diet], IV, no. 51

Aldor on liberty of association

93 Ibid II, no 9 and III, no. 20 'every civil society, great or small', should 'properly be a legislature for itself', and should not form itself on a

* The German is *Handwerksehre*. The guilds imposed standards of decent work Hegel in his *Philosophy of Law* (§§249–54) speaks of society as assuming a moral character in corporations, and of the individual as having his 'honour' in and through his corporation.

† This may remind us of the 'frith-guilds' and the later 'frank-pledge' in our own

general plan or on philosophical theories. Cf. also IV, no. 41 ("each Gau and Hof" [or, as we might say, each hundred and manor] had of old "its own autonomy"), and III, nos. 54, 66.

On towns, guilds and rural groups

84. For Möser's views in regard to towns, cf. I, nos. 43, 53; III, no. 20 (every small town ought to have its own peculiar political constitution), and I, no. 39 (where he opposes the exemption of the servants of country-landowners from civic taxes). For his views about guilds, cf. I, nos. 2, 4, 48–9; II, nos. 92–5, and as regards rural communities, cf. III, no. 1 (on the sovereign right of each peasant community to exclude strangers and sojourners) and II, no. 41; III, nos. 43, 59–3.

Proposals for new associations

95. Cf. e.g. the proposals for the founding of a company for world-trade by the united towns of Germany (I, no. 43), the founding of a separate college of advocates [like our Inns of Court] with an exclusive corporate constitution (I, no. 50), the founding of a "circle-association" for putting a stop to distilling in the event of a shortage in corn (I, no. 64), the starting of a company for conducting trade in corn on the Weser (I, no. 92), etc.

96. Loc. cit. III, no. 20, p. 71.

97. *J. n. N. g.* VII, c. 2, §§21–2, cf. III, 37–40, supra.

Pufendorf on the rights and status of corporations

98. Pufendorf deals with corporate property in *Elem. jurisp.* univ. I, def. 5, §§5–6. *Proprie autem non solus quos ad personas singulares pertinent, sed et quos ad personas morales conjunctas seu societatis quas vocant.* Neither third parties, nor the members themselves when they are not "conceived as the whole society", own any right to such common property. But in addition to common property of that description, which is in the *plenum dominium* of the society, a society may also possess property of another description, where the "use" belongs to "individual members" (*singuli*)—and indeed (Pufendorf adds) there are many cases of such property where the use is open also to outsiders.

Pufendorf also deals (*Elem.* II, def. 12, §28; *J. n. N. g.* VII, c. 2, §22 and VIII, c. 6, §19) with obligations incurred by a *corpus* in consequence of the legal transactions of its *rector* or *syndicus*. He assumes, like Hobbes, that in such cases the corporate property is liable for the satisfaction of the claims of its members, but where the claims of third parties are concerned, he holds that the individual members are responsible, each of them *pro rata*—though if there be refusal to discharge a claim, each can be made responsible for the whole amount.

Finally, he deals with *delicta universitatis* (*J. n. N. g.* VIII, c. 3, §§28–9; *De off. hom. et civ.* II, c. 13, §19). He expounds the usual theory, but he suggests that innocent individuals should not be included in any punishment, and that all punishment should cease with the disappearance of the persons who were concerned in any given delict. He justifies this latter suggestion on the ground that, though there are certain attributes, such as possession or rights, which belong to the *universitas per se*, there are others, such as learning or moderation or courage, which cannot be ascribed to a township, and *et denuntiatione a singulis*. To be deserving of punishment is an attribute of the second kind, for a *universitas*, "as such", has no *animus mereas poenam* ["no intention deserving of punishment"]. [Cf. Grotius, supra, n. 50 to § 15.]

99. This is the view we find in Thomasius, Treuer and Titius, cf. n. 151 to § 16.

100. Cf. pp. 191–3 supra. Gundling's *dissertatio de universitatis delinquentis* (cited by him in his *Jur. nat.* c. 36, §§23 and 26, in order to prove the impropriety of the punishment inflicted by Poland on the city of Thorn) belongs

to the literature of criminal law, and can only be discussed in connection with it.

Gundling's confusion of corporation and partnership

101. Cf. nn. 160 and 169 to § 16. Gundling, in dealing with the *societas mutata*, or, as he calls it, 'stancopey', and in treating of *communio utilis* [i.e. 'quasi-society', as Wolff terms it, n. 169 *infra*], uses Roman law as the basis of his argument (*Jur. nat.* c. 23, §§61–3). But (1) he treats a society as being a single 'Subject' or owner of rights, and (2) he regards as contrary to Natural Law the positive-law rules which make it improper for a society to agree to exclude parts for the division of its common property, or which treat the death of its members as producing its dissolution (c. 23, § 19).

102. Cf. nn. 38 and 59 to this section; cf. also Huber's *Prael. Justit.* II, 1, no. 7 (*multi hominum coetus, quos nos familias et nos libera Respublica*), and *Dig.* III, 4, no. 1.

103. *Dig.* III, 4, no. 1, xxvii, 2, no. 2, *De jure civ.* II, 3, c. 2, § 2.

Huber's use of the term universitas

104. Thus a university is a *Universitas*, but gymnasia and elementary schools are not, because they have no *rigmen civitas*. *De jure civ.* II, 3, c. 3, *Dig.* III, 4, no. 2. In dealing with groups of the type of the local community (*municipia familiarum*), Huber treats not which have no magistrates of their own as not being *universitates*, even though they have common property, and he takes the same view of provinces, when they have no separate constitution, with provincial Estates of their own, but are directly administered by a prefect [*De jure civ.* II, 3, c. 3, nos. 4, 18–22, *Dig.* III, 4, no. 4].

105. *Collegia magistratuum* are not *universitates*, for they do not possess a *regnum et unum e summa republica diversum et consistens partibus* [*De jure civ.* II, 3, c. 5, § 23].

His Collective sense of corporations

106. This idea of a purely 'collective' (or 'bracket') Group-personality appears in Huber's theory of the *res universitatis* (*Prael. Justit.* II, 1, nos. 4, 8), and of other forms of corporate property (*De jure civ.* II, 9, c. 1, § 35). It also appears in his theory of the legal transactions of corporations, and more especially in his view of the obligations which a *universitas* can incur. Here, in the usual manner of his time, he refuses to recognise that a *universitas* can be bound by contract, except when *omnes et singuli* have given a formal assent, or when its representatives have been acting within the terms of a specific mandate; otherwise, he confines the liability of a *universitas* to cases where it has profited by some transaction [i.e. where there has been a *lucrum emergens*], and he takes the general view that an *obligatio universitatis* entails a proportionate or 'limited' liability of all its members (as being the *pars ex quibus totum constatur*)—cf. *De jure civ.* II, 3, c. 6, §§ 1–18, *Dig.* III, 4, no. 4.

We find the same idea of a merely 'collective' Group-personality in Huber's theory of the delicts of a *universitas* (*De jure civ.* II, 3, c. 1, §§ 39–43, c. 6, § 13, *Dig.* III, 4, no. 3), and of its capacity for being represented in a suit at law (*Dig.* III, 4, nos. 4, 6). A similar trend appears in his treatment of the validity of majority-decisions. While he derives it from the 'social' or partnership element in a *universitas*, on the ground that the principle may have been agreed upon beforehand [by each individual partner] in the society, he also limits its application strictly, and that on the very same ground—e.g. he holds that it is only the [individual] *commentarii* and their heirs who ought to incur liability in virtue of an obligation [arising from a majority-decision] (*De jure civ.* II, 3, c. 6, §§ 23–4).

Huber emphasises, again and again, the identification of the 'collective

person' with the sum of the members. *Ipsa universitas est persona* (ibid. c. 1, § 36); *quam corpus universum est universitas, non forma corporis, et aliqua ergo universitas* (*Institutes*, 1, 1, no. 7).

107. See n. 60 to this section. Huber accordingly refuses to recognise any real autonomy of a society (*Institutes*, 1, 2, §§ 5, 10). It is not, of course, inconsistent with this that he should regard it as possible for a *universitas* (like any individual subject of a State) to possess not only *dominium*, but also *imperium*, *outside the State*. He concludes, however, that [though this is possible] it is not really the case with the *Societas Indica* [the Dutch East India Company], for the Company only exercises an *imperium* belonging to the United Provinces. *De jure civ.* 1, 3, c. 8, §§ 14–21; cf. also § 19. *The issue of the authority of corporate bodies*

108. The only distinction which Huber draws between *societas* and *collegia*—bodies which he regards as in other respects very similar to one another—is that the majority-principle is the rule in the latter, and the exception in the former. If, therefore, the rule of the majority is introduced into a *societas* by an agreement among its members to that effect, a *societas* is thereby transformed into a corporation. It is thus that *societates* are often raised to the position of *universitates* (*juris universitatis dignitate*). This is what happened to the Roman companies of tax-collectors, as it has also happened to modern colonial and trading companies, *quae, quam primo fuerant Societates, denuo in formam Collegiorum redactae sunt, ut aliter administrari possint* (*De jure civ.* 1, 3, c. 2, §§ 2–13; *Dig.* xvii, 2, no. 2). *The issue of the relation of partnerships and corporations*

109. Vide supra, n. 60 to this section.

110. A view like that of Huber appears in Schmier: see n. 61 supra, and compare what he has to say about the *jura universitatis* (*Jurispr. publ. univ.* v, c. 2, nos. 52–64) and the *debita universitatis* (ibid. iii, c. 2, nos. 95–104) with his argument about the rights and duties of a *universitas* in regard to its members (ibid. v, c. 3, nos. 59–65). In dealing with this last topic, he speaks of the members as being in a position of dependence which obliges them to render obedience and loyalty, but as having a corresponding claim on the society to promote their prosperity and to protect them, and he explains both the position and the claim by the fact that the authorities of the corporation *nomine Reipublicae repraesentant, atque in illius certam et participatione mandata et jubear imperant*. *Schmier on the universitas and its members*

We may also note the fusion of a natural-law theory of *societas* with a Roman-law theory of corporations in Micraelius (1, c. 7), Felwinger (pp. 908–14), Knichen (*Opus pol.* 1, c. 5, th. 1–15), and Kruttmayr (*Grundriss*, §§ 11, 19).

111. This result is already to be seen plainly in Huber. He expressly says that *jus quo universitatis nomine utitur quod habent privati* (*Dig.* iii, 4, no. 3), and he uses very plain language in enunciating the view that the inherent rights which a *universitas* can claim for itself are limited to matters connected with its possessions (*causae patrimoniales*) [cf. *De jure civ.* ii, 3, c. 1, § 38]. When he deals with the public-law rights of a corporate body, he makes them belong not to the *universitas* itself, but to its officers as representing the public authority. *The results of Huber's views*

112. J. H. Boehmer, for example, uses the conception of the *societas aequalis* in order to justify the status of the *collegium sive universitas* as *una persona moralis*, and to prove the identity of this collective person through all the changes in its membership. He goes on to make this conception the basis of his theory of the possessions, the debts, and the legal transactions and *Boehmer bases the corporation on the societas aequalis*

delicta of the universitas, indeed he makes it the basis of a general distinction between *mere conjunctio mentis* and *nexus*, which he uses again and again in connection with all these points (*Introd.* to *jus publ.* univ., *P. spec.* II, c. 4, § 1 n. 1, §§ n. f, c. 10, § 5 n. *pp*).

113. See pp. 171–3, *supra*.

114. See, as representing this whole line of thought, Nettelbladt, *Syst.* nat. §§ 1196–40 and Hoffbauer, p. 288.

115. Montesquieu, on the other hand, while he takes an 'institutional' view of corporations, champions their cause, cf. n. 91 to this section.

The corporation confused with the foundation

116. This is the case with Turgot (n. 15 to this section), and the same failure to distinguish between corporations and foundations appears in the debates of the National Assembly (see nn. 90–3 to this section). We may also trace an unconscious transition from the idea of a society as being an association to the idea of it as being a State-institution or foundation in the theory of Schendemantel—and this notwithstanding the fact that he interprets all groups as 'associations' (without seeking to distinguish between societas and corporation), and that he bases all the rights and duties of groups on a contract between their members: cf. III, pp. 244 sqq.

117. See above, pp. 168–9.

118. This is particularly the case with W. von Humboldt, *Ideen*, p. 129.

Huber recognizes bodies which are not universitates as moral persons

119. See n. 128 to § 16. In particular, we find Huber expressly arguing that men without magistrates of their own cannot be *universitates*, even when they have *res communes*, *et eorum nomine agere et commune patrimonium habere*, for these rights, he contends, may be exercised wherever there is simple co-ownership [i.e. the co-owners may act and meet in respect of what they own], whether or no there is also a *societas* (*De jure civ.* III, 3, c. 5, § 4). [Just as he allows some rights of acting and meeting to a village which is not a *universitas*, so] Huber would also allow merely tolerated sociétés (e.g. Anabaptists and Arminians) to enjoy the rights which are necessary for their continued existence, although they are not *universitates*: e.g. they should have the right of entering into contracts, though not that of receiving legacies (ibid. III, cc. 6–9, *Dig.* III, 4, nos. 3).

120. See nn. 154, 162 and 169 to § 16.

121. See nn. 155, 166 and 167 to § 16.

Extreme of the construction of the moral person

122. On the extension of the conception of the 'collective person' in Hert and Gundling, see nn. 160 and 163 to § 16. It is also instructive to notice the line taken by Huber, when he is seeking to find the differentia of *societas*, as contrasted with *universitas*. [This is a task which he essays in the course of an exposition of the *contractus societatis*—an exposition which is made to include a theory of the partnership in property between husband and wife, under the name of *societas conjugalis*.] He entirely avoids the pot-fall of making the differentia consist in the absence of moral personality. See *Dig.* 17, 2, nos. 8–13, and see also nn. 108 and 119 to § 16.

Boehmer, too, [makes no sharp distinction between *universitas* and *societas*, he] distinguishes a *universitas* from a *societas sapientiae* only by the fact that it is not instituted *ad eorum bonum et quaestum*, cf. *P. spec.* II, c. 4, § 1 n. 1. Schendemantel, in much the same way, applies the conception of the 'composite' person to families and partnerships also [as well as to corporations proper], III, pp. 244 sqq.

123. The fundamental ideas [of this Fellowship theory] were expressed in England by Locke, II, c. 6, §§ 95–9.

124. The fact that he even manages to establish a relation of this order between 'natural' and 'positive' feudal law shows how far Nettelbladt could go in this direction.

125. Cf. *supra*, pp. 124–6 *sqq.*, and nn. 170 *sqq.* to § 16. Nettelbladt accordingly makes the distinction between the *status internus* of a society and its *status externus* (§ 334) the fundamental basis of his theory of corporations. Achenwall goes even further in drawing a hard and fast distinction between the *internum jus* of a society (II, §§ 6–13) and its *externum jus* (ibid. §§ 14–22): in the one case [i.e. as regards *internum jus*], he only employs the idea of a *natura prudentiae secundae*, in the other, he uses that of a *persona moralis*. *Distinction of the internal and the external points of groups*

126. See nn. 65–70 to this section, and also nn. 75, 81 and 85–6.

127. Wolff, *Jurisp.* §§ 841, 846; Heineccius, § 14; Cocceji, § 180; Danes, § 762; Nettelbladt, §§ 336 *sqq.*; Achenwall, II, §§ 24 *sqq.*; C. von Schlözer, *De jure suff.* § 3; Hoffbauer, pp. 187, 192.

128. Cf. nn. 175, 178, 181 to § 16.

129. Wolff, *Jurisp.* §§ 979 *sqq.*; Nettelbladt, §§ 338–9; Achenwall, II, §§ 32–9; Hoffbauer, pp. 192–3 and 205 *sqq.*

130. The argument of Achenwall deserves special notice in this connection (II, §§ 24–8). All the members of a *societas aequalis* have identically the same *jus ac obligatio*: therefore the 'common consent of the members' must determine the means which are necessary for achieving the end of this society, and where this common consent has not been given and declared in the original pact itself, it has to be expressed in *conclusa* formulated subsequently to the pact. Inasmuch, however, as all the members cannot always assemble and give their consent to these later *conclusa*, an agreement (*ex societatis pactione*) is made at the time of the initial institution of the society, determining the proper procedure to be followed in the future: the *modus consensus solidus* thus comes to be fixed in advance, the rules of precedence which may have to be followed, and the method of counting a majority of votes, are agreed upon, etc. A similar argument appears in Wolff, *Jurisp.* §§ 841 *sqq.* (on the methods of 'common consent'), Nettelbladt, §§ 374 *sqq.*, Hoffbauer, pp. 199 *sqq.* *Achenwall on the form of majority-decision*

131. Nettelbladt, §§ 363–6. The reception of new members is an act whereby the *societas*, in virtue of the *jus societatis sociis*, declares that an *externus* who desires to be a member is thenceforth to count as such. It is an act which alters *status* [i.e. the existing system of relations in the society], and therefore modifies rights and duties [for all the old members], to an extent determined by the purpose of the society [e.g. the higher the purpose, the greater will be the change which an increase of the number of members makes in the existing system of relations and the existing rights and duties of members]. No particular rules can be laid down in regard to the quality and quantity proper to the members of a society; all that is needed is *voluntas recipiendi* and *voluntas recipiendi recipiendi*; the contract [by which a new member is received] is a valid contract even when, as is the case among the freemasons, the candidate does not know the exact object of the society, but knows that it is a permissible object. Cf. Wolff, *Jurisp.* §§ 836–7 and 846, and cf. also the views of S. Cocceji (III, § 105) on the *status collegii* [the system of relations existing in an association] which regulates participation in corporate rights, and on the *acta praerogativae* which members have given them for the protection of such rights. *The reception of new members into a society*

Expulsion or resignation from a society

122 Logically enough, Nettelbladt refuses to recognize either a right of the member to quit a society freely, or a right of the society to expel a member by its own exclusive action, and he will only allow exceptions to be made in either respect in *pari necessitate ob calamitosam affectionem* ['under duresse of the law of necessity, in cases where there is a conflict of duties'], cf. §§368–70 and *Jurispr. pos.* §835. Hoffbauer takes the same line, pp. 198–9.

Wolff, on the other hand, is willing to allow a member to quit a society if there is no agreement to the contrary, provided that it is not to the detriment of the society, indeed, he is even willing to allow it—provided that an *alterer* is substituted—in cases where there is an express agreement that a member shall not quit a society without his assent. Conversely, he holds that a society has always the right to expel a negligent or hostile member (§§850–3). Heineccius holds that any *societas* lasts only as long as there is *consensus*, and a member is therefore always free to quit (II, §14). According to Achenwall (II, §§12–13), a *universitas* has the right and duty to coerce or expel a member who offends against the agreement on which it is based, and, conversely, members have a right of coercion or resignation as against a *universitas* which adversely affects their rights.

123 Nettelbladt, §§362, 367, 371. See also his *Jurispr. pos.* (§§856–9 and 876) on the rights and duties of the officials of an association in positive law, on the responsibility which officials incur in consequence of their administration, and, more particularly, on the position of the *syndicus* of an association.

124 Nettelbladt, §§89 and 370, and *Jurispr. pos.* §§846 and 863. Heineccius takes the same view, II, §§90–1, and so does Achenwall (*Prolog.* §99)—with a reservation, however, in favour of those exceptions to the general rule [that corporations have the same rights as individuals] which arise from the *diversa laxioris indoles et societatis natura*.

Analysis of Nettelbladt's method of dealing with associations

125 Under the head of *jurisprudentia naturalis generalis secundi*, Nettelbladt treats first of the *generalissima et secundaria principia*—of the general conception of associations, and their origin, end, status, authority, kinds and members (§§326–71). He then deals with the application to *societates* of the rules of Natural Law which relate to *signa*, discussing such application in detail with reference to *actiones, res, leges, negotia, pacta, obligationes, pactum de quem, and notabile pacta* (§§372–414).

Under the head of *jurisprudentia particularis generalis* (*Jurispr. pos.* Book II), he begins by remarking (§845) that the rules which have been previously stated with regard to *signa* (Book I, §§45–845) are also applicable to *societates particulares*. He then proceeds to treat of *universitates particulares* in general (sect. 1)—dealing with their different species (tit. 1), with their *potestas, directorium* and *officia*, and, more especially, their *munera* (tit. 2), and with their membership (tit. 3). Next, he treats (in a somewhat different order from that followed in his treatise on Natural Law) of the application to *universitates* of the positive-law rules relating to *signa*. Here he deals first (sect. 2) with the theory of persons (tit. 1), things (tit. 2) and actions (tit. 3), he then deals (sect. 3) with *leges et mores jurandi*, he proceeds (sect. 4) to *obligatio* (tit. 1), *pacta* (tit. 2) and *pactum* (tit. 3), and he finally deals (in sect. 5) with *notabile pacta*.

Achenwall (II, §§16–21) also draws a parallel between Natural Law in regard to 'societies' and Natural Law relating to individuals, distinguishing, in both cases, between three sorts of rights and duties—the absolute, the hypothetical, and those which arise from *facta*.

136. *Syst. nat.* §373. *Jurispr. pat.* §866. A similar argument appears in Achenwall (II, §24) and Hoffbauer, pp. 199 sqq.

137. *Syst. nat.* §§374–92. Nettelbladt discusses under this head (1) meetings, which may be either 'stated' or specially summoned, and either direct or representative, (2) *jura directoriale* (e.g. the summoning of meetings, the making of proposals, the collecting of votes and the formulating of resolutions), (3) votes and their different species (e.g. voting by heads and voting by *curiae*), (4) the right of voting, which belongs to all equally in any case of doubt, but lapses for the time being when a member abstains from voting or is absent in spite of having been duly summoned, and does not exist at all when the issue in question affects a member personally, (5) the order of voting, and the right to alter a vote given before a decision is finally taken, (6) the counting or weighing of votes, (7) the method of counting, (8) the formulation of decisions, (9) unanimity of votes, majority of votes, and equality of votes (in the last event, he remarks, *nihil constatum est*, but the use of the lot eventually decides the issue), (10) the majority-principle (which is satisfied by a relative majority), and the exceptions to that principle, (11) the *ius Pacis* [or the taking of a division], and, more especially, the decision of the question whether an issue is really present which is suitable for settlement by that method, and (12) the cancelling of a decision. He expressly remarks that all the rules suggested are equally valid for the decisions of a representative body or for those of a collegiate body of officials. *Nettelbladt's account of the deliberations and decisions of corporate bodies*

138. *Jurispr. pat.* §869. Nettelbladt also mentions the requirement that all should be summoned, and at least two-thirds should be present, the greater weight which is sometimes recognised as due to *senioribus* [i.e. to the *seniores*, as distinct from the *maiores*, *pars*], the *calculus Minerva*, §867 [what we should call the 'casting vote'], the continuance of the right to vote in spite of *ius suum*, and the validity of a vote in one's own favour (a principle to be assumed in Germany on the analogy of canon law), §868. He also treats in detail of corporate seals (§870) and the proper proofs of *voluntas et consensus* (§871). *His account of the rules of positive law on these matters*

139. Cf. Wolff (§§841–5), who even deduces from Natural Law the principle that where the contributions or benefits of the members are unequal, their voting power should be unequal, and proportionate to what they give or receive. See also Darnes, §763, along with §§750–62, Achenwall, II, §§26–8 (where, however, the reader is referred to *leges consuetae* [i.e. positive law] for most of the particular questions raised), and Hoffbauer, pp. 199–204. Christian von Schlözer (*De iure suffr.* §§8–23) also seeks to derive the rules of corporate action from Natural Law, but he holds that Natural Law does not warrant either the principle of majority-decision, or the binding of those who are absent by the vote of those who are present. He thinks that, if the idea of the *societas aequalis* is to be preserved, an agreement must be assumed by means of *pacta adjecta* [i.e. positive rules super-added to Natural Law] before there can be any validity attached to the act of a majority, whether the majority be the ordinary form of majority (which in any case of doubt must be absolute, and not relative) or some specially qualified form. This same is true in regard to casting votes, in regard to the obligation incurred by absent members (here there should also be further rules both about the competence of those present to take a decision and about the giving of votes by letter or by proxy), in regard to voting, for reasons of equity, by *curiae* or classes, and, finally, in regard to *ius suum in partes* and *ius suffragiorum rei* *Other writers on the rules of voting*

actum adhaerentum [i.e. the right of claiming a division, and the general methods of getting some sort of unity out of a number of conflicting views on an issue]

140. Cf. n. 184 to §16, and the following notes.

The rights and limits of a majority

141. See Nettelbladt, §§388–9 (where it is argued that there can be no majority-vote *in causis juris regularem commutantibus*), and §392 (where it is contended that decisions from which *jura quaesita* have subsequently arisen cannot be abrogated). Similarly Hoffbauer holds (p. 204) that a majority has no power to touch the rights which a member enjoys in the society (and therefore no power to touch the constitution), or even to touch any rights of a member derived from any other source. C. von Schlözer contends that where pure natural law is followed—and where, accordingly, there is neither any majority-vote nor any obligation of the absent by the vote of those present—no question arises of [the majority modifying] the *jura singularum* or the *leges fundamentales* (loc. cit. §13), and even where the validity of the majority-principle has been agreed upon by additional contracts [supplementary to the original contract constituting the society], the *pacta fundamentalia* and the *jura singularum* are exempt from the operation of these contracts, and can only be altered by a *unum pactum* [in substitution for the original contract constituting the society].

142. *Syst. nat.* §§393–6, cf. Wolff, §§197 and 1128–9 (where it is further suggested, in regard to the possessions of a community, that they belong to 'the descendants' also),* and Achenwall, *n.*, §19.

143. *Jurisp. pon.* §§672–7 (where he deals specially with the legal questions of *salarium*, the 'year of grace' [i.e. a year's revenue granted to the family of an official at his death], family-property, and the *administratio bonorum*).

The by-laws of an association

144. *Syst. nat.* §398. The same line is taken by Wolff, §846 (see n. 66 to this section), and by Achenwall. The latter argues in *n.*, §§29–30, that all the *leges* of the 'equal society' are *leges conventionales*, to which new members tacitly submit, but it is only *ut singuli* that the members are bound by these laws, and *ut universi* they are *supra leges*, and can alter them at pleasure. In the same way he also argues (loc. cit. §34) that in the 'unequal society' the *superior* promulgates laws by which he is not himself bound, and which he can alter at will. But even in the 'unequal society' the *leges fundamentales* [as distinct from ordinary laws] are always to be regarded as *pacta* [and are therefore unalterable except by the consent of both parties to the pact], cf. Nettelbladt, §399, and Achenwall, §35.

145. *Jurisp.* §§384–91 (where he also treats of conflict of by-laws, their relation to common law, and their interpretation and application).

146. *Syst. nat.* §§400–2. He pays particular attention to the contracts into which the *Superior* can legitimately enter *maniste summo, limite summo potestatis non transgrediendo*, but he holds that in 'equal societies' which possess *potestas* it is only a decision of the society itself which can authorise such contracts.

The obligations of association

147. *Syst. nat.* §§404–5, where Nettelbladt argues that the 'obligations of individuals' are the duty of obedience and the duty of accepting office in the society, and that 'obligations of the society' [as distinct from those of individuals] arise from undertakings given by representatives, from sense in non *spear societatis*,† from the acts of a *mandatarius* legitimate acting within the

* I.e. Wolff recognises not only (1) the present society and (2) the present *singuli socios*, but also (3) 'the descendants', as having rights in the possessions of a community.

† See n. 151 to §17 supra.

bounds of his powers, and from *ultra vires societatis*. A similar argument appears in his *Jurisp. pos.* §§893–4. In §898 he also deals with the non-admissibility [as regards societies] (*a*) of the principle of compensation as between *diversae fisci* [the different 'accounts' in the common fund?] and (*b*) of the principle of *restitutio in integrum* [the rescinding of an act by an official, in order to prevent the legal consequences which ordinarily attend such an act from taking effect].*

148. *Jurisp. pos.* §§895–7. He adds that a member is never responsible for another member, nor is a *necessitas* in *universitate*, unless he has an obligation as heir.

149. Inst. §877. He also remarks, in the preceding section, that a *universitas*, as a 'moral person', cannot administer its own property itself.

150. Achenwall (*u*, §71) holds that a *societas*, as such, is capable of all obligations—both the 'absolute' and the 'hypothetical', and both the hypothetical arising from permissible and the hypothetical arising from non-permissible actions. Schedemann only remarks (*i*, p. 290) that 'penalties attached to whole communities should only affect the benefits which arise from the particular bonus of the given society'.

151. *Spec. nat.* §§406–7. He enumerates as *jura societatis* (in contradistinction to *jura singulorum*) the following: (1) the admission of members, (2) the expulsion of members, (3) the disposition of the *res societatis*, (4) the making of provisions for the *negotia societatis*, (5) the imposing of contributions for the attainment of the society's objects, including contributions from the *res et facta singulorum*, (6) *dispositio de quo jure societatis* [*quo jure societatis?*], even if such disposition be to the advantage or disadvantage of individual members, and even if it takes the form of self-limitation or restriction (e.g. that of renouncing a *jus probandi*). *Nettelbladt on jura societatis.*

152. *Jurisp. pos.* §§899–909. Such peculiarities in the rights and duties of societies include privileges or charters, acquisition by *collectatio*, the loss [of property] after the lapse of 100 years, or by destruction, and limitations on the power of alienation.

153. *Spec. nat.* §§408–9, and also §§293–299.

154. *Jurisp. pos.* §§904 and 906 (which treat of interdicts [or, as we might say, 'injunctions'] and the peculiarities of fiscal law in regard to 'societies'). *On possession by societies.*

155. Loc. cit. §905. As regards *jura affirmativa*, possession of such rights is acquired [by other parties, as against a *universitas*] through toleration by the *universitas* itself, and not through toleration by individual members; while, conversely, the acquisition of possession by a *universitas* [as against other parties] can only be defeated by a stoppage of the proceedings of the *universitas ipsa*. As regards *jura negativa*, possession of such rights is acquired [again by other parties, as against a *universitas*] through prohibition addressed to the *universitas* and the acquiescence of the *universitas ipsa*, while, conversely, the acquisition of possession by a *universitas* can only be defeated, once more, by a stoppage of the proceedings of the *ista universitas* and the acquiescence of all its members therein.

156. *Spec. nat.* §§410–12 and *Jurisp. pos.* §§908–9 (reprisals, Nettelbladt argues, are not only permissible between States: they are also permissible, in a peculiar way, between Churches, but other *universitates* have no more right in this respect than belongs to individual subjects). *On legal remedies of societies.*

* The argument appears to be that ordinary societies do not enjoy the benefit of these principles, while the 'great society' of the State does.

157. *Syst. nat.* §413. the jurisdiction of a society is no proper jurisdiction, such as that which universally appertains to States it is rather a *consensualis potestas judicandi*

158. *Syst. nat* §414 (which deals with the processes of *actor, reus* and *procurator*) In his *Jurisp. pos* §§878–80, Nettelbladt deals more fully with the modes of legal action open to *universitates* He draws a distinction between cases in which the *causa universitatis* *per solos* is 'divisible', and those in which it is 'indivisible' In cases of the first sort, the members (*singuli*) are in a position to make an effective disclaimer, though they are open to doubt as witnesses, but in cases of the second sort also they are not altogether free from suspicion as witnesses, and the distinction is thus really slight. . A *universitas* should take an oath by means of three or four of its members Nettelbladt also discusses the documentary evidence proper in such processes, and the proper proofs of descent in family-disputes

In §911 he deals with the prior rights of a *universitas* in cases of *concursus* [i.e of a conflict of claims]; and in §912 he treats of the conflict of claims arising when a *universitas* itself is involved as debt In the latter case he holds that, inasmuch as the substance of the property is inalienable, there can only be a *concursus successivus*, with a sequestration and division among the claimants of the *usuras* arising from the property

159 *Jurisp. pos* §846, cf also Achenwall, II, §9

160 Cf especially Wolff, §977, and Achenwall, *Prolog* §94 and II, §§41–84 (with nn. 175 and 182 to §16 above) see also Cocceji, §281, Daries, §§605sqq , and Nettelbladt, *Syst nat* §§668sqq (where he classifies six sorts of family 'society'—*paterna, adoptiva, tutelaris, herilis, domus, conjugalis*), along with *Jurisp. pos* §831

On the other hand Hoffbauer, who treats marriage as an equal society which can be freely dissolved (pp 209sqq), considers that the relation of parents to children and servants is not a 'society' (pp 214sqq), and that the family is not a 'compound society' (p 211)

Nettelbladt treats universitates Houses as corporations

161 In his *Positiones Jurisprudentiae* Nettelbladt reckons as *universitates* the German Empire, the Catholic and Evangelical Churches, local communities, *conjunctiones et collegia*, and families (including *gens, familia* and *domus*), §§848–51 He treats the divisions of the family as *membra universitatis*, arguing that it is only special rules in regard to the acquisition or loss of members which distinguish such divisions from one another (§§860–62) He brings family-property (or *bona universitatis*) which is or *dicuntur ad quam dominum familiae* under the general head of *res universitatis* (§875), and he applies to its alienation (apart from a requirement that all the members of the family should give their consent) the general rules of Roman law in 1 9 C. *de praed. vel alien. min* (§909) He speaks of *familiae* as parties in civil suits (§882); and he refers to *statuta familiarum* [family by-laws or 'rules of the house'], which may be either *pacta*, or *dispositiones capitis familiae*, or *mores Superiorum* (§886)

In his *Syst nat* he draws a distinction between (1) the rights of ruling families to the property of the 'House' or 'line', (2) the property-rights of the Fisc, and (3) the *patrimonium Principis* (§1349), and he also speaks of the *autonomia familiarum illustrium* (§1510).

162 See especially Nettelbladt, *Syst. nat.* §§358–9, on the application of the general rules relating to 'societies' to any *peculiare collegium representativum* and to *deputationes collegii*, see also his *Positiones Jurisprudentiae*, §850, on the division

of *corpora et collegia* into (1) *separate* and (2) those which are only *pro aliquo universitatis*

More generally of co-ownership regarded as 'moral persons'

163. See, more especially, Wolff. He distinguishes, in his theory of common property, between three forms of *communio*: (1) the *communio negativa* of the state of nature, (2) *communio positiva*, with such and such shares for each participant, and (3) *communio mixta*, in which the property itself belongs to a *universitas*, and the individual has only a right of common user (*Instit.* §§191–7). He interprets, however, the second of these forms—that of positive co-ownership—as being 'like ownership by a single person', and all that he assigns to the individual participant, other than the right of disposition in regard to his share, is a right of annulling the unity of ownership 'if the common right be not enjoyed conformably to the condition that it must remain common' (§196 and §§390–1). We may compare with this his remarks on collective credits and debts (§424), on common citizenship of towns (§573), on *societas negotiatorum* (§§639–48, and especially §644, 'on the share of each member in the property of the society'), on *communio mutua* or 'quasi-society' (§692), and, finally, on the 'mining contract' in regard to shares in mines (§683), which he surprisingly brings under the head of lottery-contracts (*Glücksverträge*).

Nettelbladt not only assumes the existence of a single personality of many individuals when such individuals play the part of a 'moral person' *conjunctim*: he also assumes its existence when they *disjunctim* *quasi personam sustinent*, e.g. where it is a case of *correi* [i.e. persons severally responsible for the same debt], or of representatives and the persons they represent (*Jurisprud.* §§17–18). In his theory of *communio pontium* (*Syst. nat.* §§203–4), of *condominium* (§§220–5), and, more especially, of general and particular community of property (§§226–7), the [Teutonic] idea of 'the joint hand' makes its appearance—particularly in the fact that, while he ascribes the common property to all the members of a group taken as a whole, he also ascribes to each individual a quasi-private property in his share. In this last connection it is to be noted that he confines *dominium* proper to *res corporales*, but he regards a *quasi-dominium* in *res incorporales* as co-existing with *dominium* proper (§215). [Hence the share of an individual, being an 'ideal' or incorporeal thing, can only be the object of quasi-private property, but this quasi-private property coexists with the *dominium* proper of the whole group.]

164. It has already been remarked that the parallel between the division of one individual into several 'persons' and the union of several individuals in one 'person' helped to turn into an abstraction the idea of a person composed of a number of individuals, cf. n. 173 to § 16 *supra*.

The group as merely as many individuals

165. Thus, for example, the whole of the theory regarding the authority of a community over its members is inapplicable to a society composed of two persons only, though such a society is none the less expressly recognised as a 'moral person', and the consequence is that the greater part of the general theory of societies is inapplicable in such a case. Cf. Achenwall, II, §8 (who remarks that, provided there are more than two members, the sum of the reciprocal rights and duties thus involved gives rise to a *jus secundi concursus in regula* [*in regulae superiorem exhibet in numero*]) cf. also Heineccius, II, §74, and Nettelbladt, *Syst. nat.* §§84 and 939. Similarly we find Gunkem compelled [by this general point of view which led them to make concessions to the rights of individuals] to accept as causes of the dissolution of a society

the fact of the death of its members, or the disappearance of a member, or resignation, etc. · Nettelbladt, §333.

Yet it exists apart from individuals

166. We may notice especially, for the light which is thrown on this tendency, the way in which Nettelbladt (loc. cit. §86) seeks to justify his assumption that the 'moral personality' of a *societas* can persist in a single member, or even without any member, if there be ground for expecting its reconstruction: *societas enim personae moralis consistit in indivisibilem consociationem, si in adhuc superest unum individuum, et reproducitur relapsa; si non omnino esse desinit, quia in ipsa illud individuum plurialitatem individuorum continent.* We may also note the interpretation of community-property in Wolff, cf. n. 142 to this section.

167. Cf. nn. 114 and 130 to this section, and also nn. 176 and 181 to §16.

168. Cf. *supra*, pp. 179–180.

169. Cf. especially the views of A. L. and C. von Schlözer, and of Hoffbauer, as stated in nn. 186–92 to §16.

170. Humboldt's *Ideen*, pp. 121, 143 sqq., 185, 189: 'The less a man is enabled to act otherwise than as his will dictates or his force allows him, the more favourable is his position in the State.'

171. Ibid. pp. 189–92.

Denial of any international society

172. Cf. Pufendorf, *Elem.* §§104–6 and *J. n. et g.* II, c. 3, §23; Gundling, c. 1, §54; Hertius, II, 3, pp. 21 sqq.; Huber, I, 1, c. 5, J. H. Boehmer, *Jur. pub. univ.*, *P. gen.* c. II, §§5–7, *P. spec.* I, c. 3, §102 n. *l*. Justi also argues (§§ 221–3) that international law does not depend on the existence of a social union of States or a joint federal State. It is rather that a state of nature exists between different nations, and that they live in that state, like individuals, by their own will, without any association, in perfect liberty and equality. But they live on the same globe, they are therefore subject to the fundamental rule that they must do as they would be done by, and there thus exist among them duties of good-fellowship—though there is no society. Cf. also Spinoza, *Tract. pol.* c. 3, §§11–18, and Horn, *De civ.* c. II, §§4–9.

Admission of such a society

173. Mevius, *Prolegom.*, §§5–9 and 18–20: the *societas communis inter omnes populos* is the source of international law, and the authority of that law depends, not on any agreement, but on the rational order which holds good for this *societas populorum universalis*. Cf. also Johannes a Felde, I, c. 1, p. 5, Pufendorf, §3, Platerus, Bk. III, Lerbius, Introduction to *Cod. Gent. dipl.* I, §13, *Fragment on Natural Law*, p. 400, and *Castor-Pollux* cc. 31–2, Bonnet, I, art. 5.

Thomasius on the societas gentium

174. Thomasius, *Instit. jur. div.* I, c. 2, §§101–4, III, c. 1, §§38–56. He censures the Aristoteleans for neglecting the *societas gentium*: he proves its existence (*quae universum genus humanum natura sui ratione ad certum finem*), and he describes it as a *societas naturalis*, which produces a *jus naturale*. But international law proper is in his view only a part of the *lex divina naturalis* discoverable by human reason, it is not a *jus humanum*, or system of positive law. For (1) there is no Superior, (2) contracts only oblige men *sub mandato*, just as custom only binds them by virtue of a *tacita approbatio principis*, and (3) the assumption of an express or tacit *pactum universale* is a mere fiction.

The views of Wolff and his successors

175. Wolff, *Instit.* §§1090–2, Durer, §544 (where the *societas universalis omnium hominum* is treated as a *societas naturalis*), Nettelbladt, *Syst. nat.* §§1410 sqq. (there is a *societas naturalis* constituta 'for the preservation of the human race'), Achenwall, *Prolegg.* §§82–90, I, §§43–4, II, §§210–88 (on the *societas universalis*). In all these writers there is a general recognition that

there is also such a thing as positive international law Wolff, for example, speaks of a *jus gentium voluntarium, pactitium*, and, to some extent, *consuetudinarium*, and Nettelbladt admits *leges [gentium] sociales seu pactitias* as well as *leges gentium stricte naturales*

176. Thomasius argues that the *societas gentium* is not a *republica universalis*, but a *societas aequalis* with no *imperium*, and that, far from perfecting the State, it is *imperfectior societas* (*Instit jur div* iv, c 1, §§52–3. *Fund* iv, c 6, §3) The same line of thought appears in J a Felde, i, c. 1, p 5, and Nettelbladt also remarks (§1420) that the society of peoples is a *systema gentium* rather than a *civitas maxima*

177 Wolff, §1090 Achenwall also uses this term (*Prolog.* §§82sqq), cf Vico (p 136), *mundi ordo terrarum reipublicata una civitas magna apud Deos hominesque habent communionem*

Kant finds the ideal goal of human progress in a World-State (*Völkerstaat* or 'World-Republic') with a definite cosmopolitan constitution and a single Head, but he holds that the only goal which can be attained under present conditions is the institution of a 'League' ('Federation' or 'Fellowship') for the prevention of war (*Werke*, vi, pp 340–6, 415–20, vii, pp 162 and 168sqq). *Kant and Fichte on a league of nations*

Fichte, who differs from all other writers on Natural Law in deriving international law not from the relations of States to one another, but from those of the individual citizens of different States, desires a voluntary 'League', which is not to be a *Völkerstaat*, but is to possess judicial and executive authority for producing a state of peace (*Naturrecht*, ii, pp 361–499 , *Werke*, iii, pp 379sqq , *Posthumous Works*, ii, pp 644–[illegible])

178 Pufendorf, *De potestate civitatis*, §18, *J n n g* vii, c 5, §16, *De off hom et civ* ii, c 8, §13, Horn, *De civ* ii, c 2, §14, Bucmann, *Med* c 22, Huber, *De civ* i, 2, c 11, §§20 and 28, i, 3, c 3, Thomasius, *Instit jur div* iii, c 6, §§57–8, Schmier, i, c. 4, no 67, Hertius, *Elem* i, n 12, §§7–8 and ii, n. 18, Gundling, c 37 (36), §§37–47, Titius, *Spec. jur publ* viii, c 7, §37, J H Boehmer, *P spec.* i, c 9, §§27–9, Daries, §§608–11, Achenwall, ii, §§189–90, Heineccius, i, c 9, §§27–31, A L von Schlozer, p 117, §6.

179 Pufendorf, *J n n g* viii, c 9, *De off hom et civ* ii, c 17, Huber, iii, 4, c 3, Gundling, c 12 (11), §§34–42 and also c 24 (23), §§16–19 on '*Mascopeyen*' [or 'contracts of society'] among nations, and on *societates bellicas* and common governments, Daries, §§602–5, Achenwall, ii, §§240–2

Thomasius (*Instit jur div* iv, c 1, §§35–7 and c 8, §§1–27) adopts a peculiar line of argument He regards any federal association between a number of States, when it represents only a *social* form of *civitas voluntaria* and is constituted for a limited period, as being a *societas perfectior civitate*, on the ground that it supplements in certain directions the power of a single State which is inadequate by itself Such an association, he thinks, is indeed an 'arbitrary' community, but it stands an approach to *societas civilis* He draws, however, a sharp distinction between a *societas inter plures rempublicas confederatas* and a *systema civitatum* the former he regards as constituted only for a definite object [*certas abstinendi gratia*], but the latter as a *perpetua unio* . *indefinitae gratiae causa*. *Thomasius on federation*

180 Pufendorf, *De jure* §§9–15 and *J. n n g* vii, c. 5, §17, Huber, i, 2, c. 2, §§4–7, Daries, §§606–7.

181. Hert, for example, writing in 1689 (*Elem* i, 12, §5 and ii, 17, §§1–5), already notes that unions under a single king are possible not only where

The theory of a 'real union' of States

there is no other bond of connection, but also when there is a considerable amount of community between the countries so united. Titius, writing in 1709, in his commentary on Pufendorf's *De off. hom. et cit.* II, c. 5, § 14, draws a sharp distinction between a mere personal union, *sub uno capite*, and a real union, in which there is also a common exercise *summarum imperii partium*, and he holds that a system exists in the latter case only, and not in the former. Titius takes the same line, in his commentary on the same passage; cf. also Schmier, I, c. 4, nos. 88–96. The same view also appears in Heineccius (1737), *Elem.* II, § 119 (but he was not, as Juraschek assumes (p. 13), the first to take this view). See also Nettelbladt, § 1172, who adds the idea of [the union of] a predominant State with subsidiary States. Apart from these writers, we generally find the idea of *unio per incorporationem* expounded.

The theory of the corpus confederatorum

182. Pufendorf, *De jure* §§ 16 sqq., *J. n. et g.* VII, c. 5, §§ 18 sqq., *De off. hom. et cit.* II, c. 8, §§ 13 sqq.: there is *unum corpus*, but no *civitas*, for *singulae civitates summam in suo imperium retinent*, and they have only bound themselves contractually *unos secundum conventa unum, cui alterum parem nemo imperat*: we cannot, therefore, ascribe to this category [of *corpora confederatorum*] a State composed *ex pluribus inferioribus subditatis*, or, again, a State which leaves some degree of independence to conquered provinces. Cf. Huber, I, 2, c. 2, §§ 10–9: the federal assembly *non est consilium capitis, sed plures capitis repraesentat. non sive imperat, sed imperata negotiorum commutatio exportat*, the sovereignty of the members of the federation remains intact (I, 3, c. 3). See also Thomasius, *Instit. jur. dic.* III, c. 6, §§ 57–8, where, however, the term *respublica regularis* is used; Hertius, *Elem.* I, c. 10, §§ 7–8 and II, c. 18, and Gundling, c. 37 (36), §§ 37 sqq. Schmier remarks that it is only an appearance of *una respublica* that is ever present; *nunc unus et unanimi velut ex distinctis et diversis, utpote potentiates vel homines ita secundum et separatim habentur* (I, c. 4, nos. 77–88). Titius (*Dissert.* § 76 and *Jus publ.* VII, c. 7, §§ 34–5) speaks of *corpus unde ex pluribus constitutus ita conjunctum, ut unumquemque conlat nonnihil et plurimum etiam plenum imperium habeat, sed ita limitatum, ut quaedam quae pertinent conjunctim ab omnibus sint secundum.* See also J. H. Bochmer, *P. spec.* I, c. 5, §§ 27–9, Ulrich, §§ 808–11, Achenwall, II, § 190, Heineccius, I, c. 3, §§ 27–31 (a *pluralis unionis*, he holds, is a *corpus mixtum* which wears the appearance of a single State owing to the common exercise of the rights of sovereignty, it is a *Mixtur jetzt rationale*), Kreittmayr, § 4, A. L. von Schlözer, pp. 117–18 (what is in question, he thinks, is a 'civil society' or 'commonwealth' of States, but not a State).

Such a body cannot act by majority-decision

183. Pufendorf, *De jure* §§ 17–21 and *J. n. et g.* VII, c. 5, §§ 19–21: it is necessary that there should be some meetings, and it is possible that there should be a permanent federal council, but the deputies attending the former continue to be *summi senatores*, while the latter (the *concilium deputatorum*) has only a 'delegated power', and its *per et suffragia praeunt a nemo*: the majority-principle is inapplicable, since it means the protestate of an *inferior*, and here every member has the right of secession. Horn takes a similar view, holding that everything has to be done *ratione pacti et mutuae foederum conventa* (II, c. 2, § 14), and A. L. von Schlözer also considers that the use of a majority-vote is not possible in a federal Diet, and that, for this very reason, such a political system has no final judge and is devoid of responsibility (pp. 118–19).

Huber is the contrary

184. Huber allows a certain amount of validity to majority-decisions (I, 3, c. 3): the same view is taken by Hert, in his notes to Pufendorf's *J. n. et g.*

vii, c. 5, §20, and by Schauer, loc. cit. no. 88. J. H. Boehmer (1, c. 1, §4), Achenwall (II, §190), and Kreittmayr (§4) regard the rules of *societas aequalis* as applicable to federations. Darjes takes the same view (§§808–11); but he considers that a *directorium*, with a *principium consensuale* between the members of the federation, is also possible.

Irregular or monstrous forms of federation

185. Pufendorf, *De rep. irreg.*, *J. n. et g.* vii, c. 5, §§12–15 and 20, *De off. hom. et cit.* II, c. 6, §12, he regards any federal body in which the validity of the majority-principle is agreed upon as being a *corpus irregulare*. Gundling (loc. cit.) clings to the view that any such political system should be termed a *monstrum*. J. H. Boehmer (1, c. 3, §29), while he introduces the idea of the two possible origins of a federal system (it may be due to the negative fact of disintegration or devolution, as well as to the positive fact of *foedus* or integration), describes the 'irregular system' as possible.

The problem of the Holy Roman Empire

186. Cf. Otto's commentary on Pufendorf's *De off. hom. et civ.* II, c. 9, §12. Hertius, 1, n. 12, §§6–9 and 11, n. 19, where formations intermediate between a federation and a State with provinces, such as the German Empire, are merely treated as being *republicae irregulares*, in just the same way as ordinary unions and federations. Schauer, 1, c. 4, n. 3, §§1–3, and Turpin, vii, c. 7, §§36–54. Thus, we may also note, applies to federal forms of the State the general distinction which he draws between States which are *adventitae* and those which are *innatae* (cf. n. 167 to §17 above, and p. 155), and so accordingly includes the 'systems' (or *coalitiones compositae*) which have been constituted by a *foedus adventitum* under the head of *adventitae*, and those which are due to the disintegration of a unitary State under that of *innatae*. See also Huber (1, 3, c. 3, §§17–20), who admits that there are deviations from the general norm in the German Empire, and see also Kreittmayr (§4), who tries to meet the difficulty by suggesting that side by side with the *systema constans foederatorum aequale*, such as is to be found in Switzerland and Holland, there may also exist an unequal system of federated States, like the political structure of Germany. A. L. von Schlözer also holds (p. 118) that 'scattered in a number of fragments, the 300 members of the giant body of Germany' only constitute a mere society [and not a State].

Leibnitz on federation

187. *Causeries-Fantaisies*, c. 11, and *Demonstr. pol. prop.* 57. Leibnitz, it is true, does not base himself upon Natural Law in defending the cause of federalism. On the one hand, comparing the difference between a *confederatio* and a *unio* with that between a *societas* and a *collegium* or *corpus*, he will only admit the emergence of a new *persona ficta* when there is a corporate group (and therefore he will not admit that there is such a *persona* in a *confederatio*, which is only a *societas*, and not a corporate group), on the other hand, he abandons the idea of sovereignty, holding that a real political authority of the Group-person, exercised over the member-persons, is compatible with the *libertas et suprematus* of these member-persons. [It follows that Leibnitz (1) from the first point of view, cannot apply the natural-law idea of the 'moral' or 'civil' personality of Groups to federations, and (2) from the second point of view, cannot apply the natural-law idea of the sovereignty of the State to federations, or indeed to any other form of State, since he has abandoned that idea in toto, cf. supra, n. 48 to §17, and cf. also n. 253 to §16. In dealing with federations, Leibnitz is thus outside the ground of Natural Law, because he is unable to use either its idea of Group-personality or its idea of State-sovereignty.]

188. *Esprit des Lois*, IX, cc. 1–3. In treating of the *république fédérative*,

Montesquieu on federations

which he sometimes describes as *état plus grand* and sometimes as a *société de sociétés*, Montesquieu makes no definite distinction between the different forms which it may assume (cf Brie, *Der Bundesstaat*, I, p. 31), but at any rate he leaves room, under this heading, for a real federal State. He regards the German Empire (which he describes in another passage—Bk x, c. 6—as a *république fédérative* such, with a Head who is *en quelque façon le Magistrat de l'union et en quelque façon le Monarque*) as being a more imperfect form than the federations in Switzerland and Holland, on the ground that monarchy is not so suitable for a federal constitution

189. *Syst. nat.* §§ 1150, 1172–7, 1189, 1201–3, 1406–8. Hoffbauer is in agreement with him, pp. 314–15.

Nebenstaat or the respublica composita

190. *Syst. nat.* §§ 1150, 1172, 1174, 1408 A *respublica composita* is present when *diversae respublicae unam respublicam, caput potentia unum subjectae sunt, constituunt*, but the member-States are not sovereign, and therefore they are not, in external relations (though they are in *relationes ad Respublicam superiorem*), independent *gentes* (i e 'persons' in international law).

191. A composite State may be a monarchy or a republic: so may also its *respublicae unionis* (§ 1175). In such a State there is a *duplex potestas summa*—the *summa* and the *subordinata*, and the latter of these powers may, in turn, be exercised doubly—both by the member-States to the exclusion of the *pauper potestas* [i.e. the federal authority] and by the member-States concurrently therewith (§ 1176) Similarly there is a *duplex subjectio* (§ 1177). Such a State may come into existence either by integration of States or by way of disintegration (§ 1189). Again, in such a State, we have a new distinction between different kinds of members added to the other distinctions which we generally find in States—the distinction between *membra immediata* and *membra mediata* (§§ 1192–3). If we regard the *membra respublicarum unionis*, we find that the Heads of these lesser or contained States are *superiores* on what we may call a 'downward' view, but *subditi* on an 'upward' view, while the other members of such States [i e. the members other than the Head] are *in duplici subjectione*, with the lower *superior* taking precedence in case of conflict; §§ 1224–5. [Gierke adds that he intended to treat the theory of the federal State, as it appears in the literature of positive German public law, in a subsequent section; but this section was never published]

192. A later section (§ 20) was to have been devoted to this theme, but the section has not been written

LIST OF AUTHORS CITED

A 1500 to 1650
B 1650 to 1800

A LIST OF AUTHORS CITED. 1500–1650

ALBERGATI, F., a native of Bologna, who published at Bologna, in 1599, a work entitled *Il Cardinale*, and at Rome, in 1589, a *Trattato del modo di ridurre a pace l'inimicizie private*. Gierke refers to his *Discorsi politici* as an attack upon Bodin which is based on Aristotle (Rome, 1602).

ALSTED, J. H. A., 1588–1638, professor of philosophy at Herborn (in Nassau), and teacher both of philosophy and theology; an encyclopaedic writer on both of these and on a number of other subjects. Gierke refers to his *De Statu Reipublicarum*, Herborn, 1612.

ALTHUSIUS, J., 1557–1638, professor of law at Herborn, 1586, and syndic of the town of Emden, 1601. Gierke first drew the attention of scholars to his writings by the monograph which he devoted to them in 1880. The two of his writings which he repeatedly quotes in this section are *Politica methodice digesta*, 1st edition, Herborn, 1603, 3rd, 1614 (the 3rd edition has lately been reprinted, with some few omissions, and edited with an introduction, by C. J. Friedrich, Harvard University Press, 1932), *Dicaeologica*, Herborn, 1617, a work in two books, *totum et universum jus quo utimur complectentes*.

ARNISAEUS, H., a student and teacher of medicine, philosophy and politics, who, after first professing ethics at Frankfort on the Oder, and then medicine at Helmstedt, became physician to the King of Denmark, and died at Copenhagen in 1636. In his political doctrines he was an opponent of Althusius. He published two volumes of 'collected political writings' (Leipzig, 1653; later edition, Strasburg, 1648). Gierke refers to five of his political writings: *Doctrina politica et genuina methodus quae est Aristotelis rhetoris*, first published in 1606, and suggesting by its very title an attack on Althusius' *Politica methodice digesta* of 1603, *De jure majestatis libri tres*, first published in 1610, *De autoritate principum in populum semper omnipotente*, first published in 1611, *De Republica, seu reflectiones politicae libri duo*, first published in 1615, *De subjectione et securitate civium*, published in 1612. J. Maxwell, sometime bishop of Ross, published *Lex, Rex: the Law and the Prince*, in 1644, 'with a confutation of the ridiculous grounds of H. Arnisaeus' (and of William Barclay, *q.v.*).

ARNISAEUS, D., 1579–1673, a jurist, professor of law at Jena, and said to be founder of the study of public law in Germany. He published in 1617–29 five volumes of *Discursus academici de jure publico*, written by himself and by other scholars.* Gierke refers to various contributions which appear in this collection.

AYALA, B., born at Antwerp about 1548, a jurisconsult, who held at one time a financial post in the army of Philip II of Spain, and wrote a work *De jure et officiis bellicis et disciplina militari*, published at Douai, 1582, and republished at Antwerp in 1597.

BARCLAY, W., 1543–1605, a Scotsman from Aberdeen, who studied law at Bourges under Cujas, and himself became professor of civil law at Angers. In addition to commentaries on Roman law, he wrote: *De Regno et regali*

* Such discursus are often disputations held before—or, as we should nowadays say, theses supervised by—the professor who edits the collection.

potestate, adversus Buchananum, Brutum [i.e. the author of the *Vind. contra Tyrannos*], *Boucherum et reliquos Monarchomachos*, Paris, 1600 (Gierke cites the Hanover edition of 1612). Locke refers to this work at the end of the *Second Treatise*. Barclay also wrote a work on the Papacy, which was published posthumously, in 1609, under the title of *De Potestate papae, an quatenus in principes saeculares jus et imperium habeat*, representing the Gallican point of view.

BEECONSAW (Beconsall), W., 1496–1559, fellow of New College, Oxford, and author of *De regimine et abolitio Regis imperio*, a work dedicated to Henry VIII, and published in 1546 (Gierke cites the reprint in Goldast's *Monarchia Sacri Romani Imperii* of 1611).

BELLARMINE, R., 1542–1621, cardinal-archbishop of Capua, member of the Jesuit order, and one of the chief writers of the Counter-Reformation. Gierke refers to his *De potestate summi pontificis in rebus temporalibus adversus Barclaium* (first published in 1610, but cited according to the Cologne edition of 1611). This work, as being Ultramontane, and as attacking the more Gallican attitude of Barclay's work on the Papacy, was at once condemned by the Parlement of Paris in the year of its publication. Gierke also refers to other writings of Bellarmine, more particularly his *De Laici*, in the Cologne edition of his *Opera omnia*, 1620.

BERGERMOOR . Author of *Repetitio et explicatio de regalis jure*, Frankfort on the Oder, 1599.

BERCKERMOER, D., sometimes tutor to the children of the Elector Palatine; became professor at Utrecht in 1640, and died in 1667. Gierke refers to his *Institutiones politicae sive de Republica*, published at Utrecht in 1662. He is also said to have written, in answer to Hobbes, an *Examen alexandrinum philosophicorum de bono civi*, which was never published.

BIRGIUS, C. B., 1577–1638, a jurist, who became professor of law at Tubingen in 1610, but crossing over to the Catholic side during the Thirty Years' War (in 1630), he became professor of civil and public law at Ingolstadt, in Bavaria, in 1635. He was a voluminous writer, both on legal and (after his conversion) on ecclesiastical subjects. Gierke refers to his *Opus politicum* (or, as it was called in an earlier form, which first appeared in 1618, *Politicorum libri duo*), and cites it according to the Strasburg edition of 1656. It is a collection of 'Discourses', which are sometimes cited separately by Gierke (e.g. *Discursus III de Democratia*, and the 'Discourses' *De statu Reipublicae mixto* and *De jure Imperiorum*).

BREA, T., 1519–1605, the great Calvinist teacher in the age succeeding Calvin himself. To him we may ascribe, for reasons given by A. Elkan, *Die Publizistik der Bartholomaeusnacht*, the authorship of the anonymously printed *De jure magistratuum in subditos et officio subditorum erga magistratum*, which professes to have been printed at Magdeburg in 1578. The work deals with the problem of resistance, as it had been raised in the minds of the French Calvinists after the massacre of 1572, and seeks to re-define the Calvinistic attitude to that problem. There is a French version (of 1574), entitled *Du droit des Magistrats*, which was printed before the Latin original.

BRIMARDE . Author of *Disputatio de jure Principatus*.

BLONDEL, D., 1591–1655, Huguenot preacher and writer, successor to Vossius in the chair of history at Amsterdam in 1650. *De jure plebis in regnorum ordinatione*, Paris, 1648.

BODIN, J., 1530–96, French jurist and man of affairs. *Six livres de la République*,

1577. In Latin, under the title of *De Republica*, 1584. Cited by Gierke in the second Latin edition, Frankfurt, dated 1591. A full account of Bodin is given in J. W. Allen's *Political Thought in the Sixteenth Century*.

BOLOGNETUS, 1539–85, ecclesiastical writer on jurisprudence. *De leges, jura et aequitate.*

BOSSIUS, J., a German jurist of the first half of the seventeenth century. Four works, including one on sovereignty (*De majestate politica*, Leipzig, 1610), are cited by Gierke in note 16 to § 14. The dates range from 1607 to 1615.

BOSTIUS, M. *De natura juram majestatis et regalium*, printed in Arumaeus (q.v.), I, no. 2 (1616).

BOUCHER, J., 1550?–1644, Catholic teacher at Reims and afterwards at Paris, where he was a champion of the League, afterwards canon of Tournai. He wrote *De justa Henrici III abdicatione e Francorum regno*, Paris, 1589. Barclay (q.v.) attacks him as a Catholic monarchomachus, along with the Protestants Buchanan and Languet.

BOUDOUS, M. Z., 1604 (or 1612)–53, professor in the University of Leyden; classical scholar, historian and writer on politics. Gierke cites *Institutionum politicarum libri duo*, 2nd edition, Leipzig, 1665.

BRUTUS, STEPHANUS JUNIUS, probably the pseudonym of Hubert Languet, 1519–81, see *Cambridge Historical Journal*, 1951. *Vindiciae contra Tyrannos*, Edinburgh (really Basle), 1579. (Walker's translation, of the seventeenth century, has been reprinted with an introduction by H. J. Laski.)

BUCHANAN, G., 1506–82, classical scholar, historian and tutor of James VI of Scotland. *De jure regni apud Scotos*, 1579 (cited in the 2nd edition of 1580).

BURIUS, P., ?–1617, professor of law in the University of Franeker, in the United Provinces. *De Republica libri III*, Franeker, 1613. The British Museum Catalogue also mentions a *Tractatus de vi et potestate legum humanarum in hac parte disputatus*, Douai, 1608.

CARRIÈRE, CLAUDIUS DE. *Mallius Imperialis*, Antwerp, 1620.

CARPZOV, B. C., 1595–1666, jurist. *Commentarius in Legem Regiam Germanorum, sive capitulationem Imperatoris*, 1603. *Jurisprudentia ecclesiastica seu consistorialis*, 1649. The first of these works, dealing with the conditions to which the Emperor agreed at his election, is a treatise on the public law of Germany at the time; the second deals with Protestant Church law in Germany.

CASMANNUS, O., ?–1607, theologian and philosopher, who taught at Stade (in Hanover). He published a work on *Psychologia anthropologica* in 1594. Gierke refers to his *Doctrina et usus politicae methodicum et brevis systema*, Frankfort, 1603.

CLAPMARIUS, A. C., 1574–1604, publicist. *De arcanis rerumpublicarum libri VI*, first published posthumously, 1605.

COLLINUS, HIPPOLYTUS A., 1561–1612, a jurist, of Italian origin, born in Zurich, who served the Elector Palatine from 1593 onwards. He wrote works on the *Melchi* (1588), the *Prusaei* (1593), the *Palatinus sive Aulicus* (1600) and the *Consiliarius* (1596). The third of these appeared in the *Speculum aulicum sive politicarum observationum* printed at Strasburg in 1600, along with a reprint of the fourth.

COQUILLE (Coquille, F. de), 1508–51, a French jurist. *Commentaire sur coutume*, Paris, 1538 (cited in the Basle edition of 1557).

CORNING, H., 1606–81, professor at Helmstedt, first of medicine and afterwards also of law; one of the great polymaths of his day, who wrote on

theology as well as on medicine, law and politics. Gierke refers to the *Dissertationes* (e.g. *de Republica* and *de necessaria partium contatu*) in vol. iii of his *Opera*, as published at Brunswick in 1730.

COVARR, A., 1579–1635, Jesuit confessor and controversialist. *Pelitorum libri X*, Mainz, 1621.

CORASIUS, J. (Jean de Coras), 1513–72, French teacher of law at Toulouse, a Huguenot, who perished in the massacre of St Bartholomew. Gierke refers to his *Commentaries* on some titles of the Digest, and his *Emendationes* on certain *sententiae*, published at Lyons, 1560.

COTHMANN, E., 1557–1624, jurist and professor of law at Rostock. Gierke refers to his Commentary on Justinian's *Institutes* and *Code*, 1614, 1616.

COVARRUVIAS Y LEYVA, Diego (Didacus), 1512–77, professor of canon law at Oviedo, and bishop of Ciudad Rodrigo and Segovia, president of the Council of Castile, one of the chief jurists of his time. Gierke refers to his *Practicae Quaestiones* (in the *Opera omnia*, printed at Frankfort, 1583).

CRUGER, J., *Collegium Politicum*, Gotsen, 1609.

CUJACIUS (Cujas), J., 1520–90, professor at Bourges, the greatest jurist of his time. Gierke refers to his *Paratitla* to the *Digest* and the *Code*, and his notes on the *Institutes*.

DANAEUS (Daneau), L., 1530–96, French Calvinist minister. *Politicae Christianae libri VII*, 1596 (cited in the Paris edition of 1606).

DONOUS, M. A. de, 1566–1624, a Dalmatian, who, after being professor at Padua and Brescia, became Archbishop of Spalatro. He wrote a work *De Republica Ecclesiastica*, and being anxious to publish it, he took counsel with Sir Henry Wotton at Venice, and proceeded to England, where he received preferment, and published in 1617 the first part of his work. Another part was printed in England in 1620, and a third part in Germany in the same year. The whole work includes ten books and fills three folio volumes.

EBERHARDUS, W. de, Eberhard von Weyhe, a German jurist and statesman, 1553–1633 *aetatis*, who used the Latin pseudonym Warenundus de Erenbergk in some of his writings. His *Aulicae politicae* (Hanover, 1596), to which Gierke refers in note 6 to § 14, was printed under the pseudonym of Durus de Pascolo. (It is included in the *Speculum*, etc., mentioned above under Collibus, H. a.) He used the other pseudonym, however, for a treatise *de regno solutus* (Frankfort, 1606), which Gierke also quotes.

FELDE, J. A., see Bibliography B.

FELWINGER, see Bibliography B.

FRANCKE, G., 1594–1659, German jurist and administrator. He wrote Commentaries on the *Institutes* (Strasburg, 1658), as well as on the *Digest* (Strasburg, 1644).

FRANCKEN . Gierke cites under this name a disquisition *de statu reipublicae mixto* (or *modo*), printed in Arumaeus (q.v.), and another *de potestate principis*. (Should they properly be cited under the name of Francke?)

FRIDERICUS, Z. *Politicorum libri*, Strasburg, 1609.

GAILLIUS, A., 1531–1611, professor of civil law at Oxford, 1587–1611. Gierke refers to his *De iure belli* (1588–9), which preceded by many years the work of Grotius.

GEHEWENS, C., *Emendationes politicae*, Wittenberg, 1617–18.

GRAMMWOLD, DIRK, 1600–66, a Dutch jurist, who worked with Grotius and was associated with John de Witt. He wrote on behalf of the Venetian State, as

well as against Selden's *Mare clausum*. Gierke refers to his *De jure magistratus*, the Hague, 1642.

GOUGOUSSE, F., 1540?–96?, teacher of law first at Toulouse (hence called Tholosanus) and afterwards at Pont-à-Mousson. *De Republica libri XXVI*, 1586, cited in the Frankfort (? Lyons) edition of 1609.

GREGORIUS DE VALENTIA—see Valentia.

GROTIUS, HUGO, 1583–1645. *De jure belli et pacis*, Paris, 1625, cited in the Amsterdam edition of 1701. *De imperio summarum potestatum circa sacra*, Paris, 1646, cited in the 4th edition, the Hague, 1661.

GRYPHIANDER: *De Cash Secundo* (in Arumaeus, q.v.).

HAMAN, W., 1558–1626, professor of ethics and politics at Jena, and a follower of Aristotle. *Systema philosophiae politicae*, 1610 (cited in the Jena edition of 1628).

HAMMONS, N., 1513–1600, professor at Copenhagen, a follower of Melanchthon. *De lege naturae apodictica methodus*, 1577, cited in the Wittenberg edition of 1652.

HOBBES, T., 1588–1679. *Elementa philosophiae de Cive*, originally published at Paris in 1642 with the title *de Cive*; published under the fuller title in the Amsterdam edition of 1647, which Gierke has used. *Leviathan*, 1651. a Latin version was made by Hobbes for the Amsterdam edition of his works in 1668, and Gierke has used this version.

HOENDORFF, P. H., 1576–1640, teacher of law at Herborn, in the service of various German princes. *Disputationum politicarum libri*, 3rd edition, Herborn, 1615 (a work of the nature of a system of public law).

HOTOMAN, F., 1524–90, French jurisconsult and Huguenot; lived, after the massacre of St Bartholomew, in Geneva and Basle. *Francogallia*, Geneva, 1573, cited in the Frankfort edition of 1665. (Translated into English in 1711 by Viscount Molesworth, with a famous preface on the nature of Whig principles.) Gierke also refers to his *Quaestiones illustres*.

KECKERMANN, B., 1571–1609, professor at Heidelberg, and a follower of Aristotle. *Systema disciplinae politicae*, Hanover, 1607.

KIRCHNER, H., published a number of works at Marburg, including one entitled *Legatus* (the rights, dignity and office of the Ambassador, 1614). Gierke cites his *Respublica*, Marburg, 1608. Coryat's *Crudities* includes his oration 'in praise of the travell of Germany in particular'.

KLOCK, MELCHIOR, 1504–71, jurist and lecturer at Wittenberg. *Lucubrationes in libros IV Institutionum*, 1542.

KNOBEL, A., see Bibliography B.

KNIPSCHILDT, P., 1596–1657, publicist and syndic at Eslingen, an imperial Free Town. *Tractatus politico-juridicus de juribus et privilegiis civitatum imperialium*, Ulm, 1657.

KUHNS, . *Aeque disputationum politicarum*, Jena, 1619. *Theatrum politicum* [n.d.].

LAGEMANN, J., 1593–1649, jurist and minister in the duchy of Brunswick. *De jurisdictione imperii Romano-Germanici* 1630 *circiter*. Conring (q.v.), and later Kulpis (see Bibliography B), were concerned in the later editions of the work, published under the title of *De republica Romano-Germanica*.

LAMPIUS, HOMPHARTUS A (the pseudonym of B. Chemnitz), writer and publicist, 1605–78. *De natura status in imperio nostro Romano-Germanico*, 1640. (*Status* rather here is not *raison d'état*, but 'general principles of government'.)

LAUTERBACH, W. A., 1618–78, jurist and professor at Tübingen. *Dissertationes*

academicae, 1694. *Conjectanea juris*, 1679. Both of these works appeared posthumously

LESSIUS, L., 1554–1623, Jesuit, professor of philosophy at Douai, and afterwards of theology at Louvain. *De justitia et jure*, 1606 (cited in the edition published at Antwerp in 1612).

LEUCHTHAL, C., 1586–1647, professor of 'practical philosophy and rhetoric' at Giessen. *Collegium politicum*, 1619, cited in the Marburg edition of 1644.

LEUNCLAVIUS, J. L., 1592–1665, jurist, chancellor in the duchy of Brunswick. Gierke refers to *Jus publicum Imperii Rom.-Germ.* 1645–45. He also wrote a commentary on the *Wahlkapitulationen* (*Capitulationes electorales*), from Charles V onwards, published in 1651 at Strasburg

LIPSIUS, J., 1547–1606, professor at Leyden (with Scaliger), and afterwards at Louvain. *Politicorum libri VI*, Antwerp, 1589 (cited in the edition of 1604) (Lipsius advocated a system of one exclusive religion, and his policy for dissidents was *pro et saeve*.)

LUGO, J. DE, 1583–1660, Spanish Jesuit, professor of theology in Rome, made cardinal in 1643. (Quinine, first distributed in his palace by the Jesuits, who had received it from South America, was called *poudre de Lugo*.) *De justitia et jure*, cited in the Lyons edition of 1670

MACHIAVELLI, N., 1469–1527. *Il Principe*, published posthumously, 1532.

MARCA, P. DE, 1594–1662, French canonist and bishop. *De concordia sacerdotii et imperii, seu de libertatibus ecclesiae Gallicanae*, 1641 first part, 1663 as a whole.

MARIANA, J., 1537–1624, Spanish Jesuit, who from 1574 to his death lived and wrote at the house of his order in Toledo. *De rege et regis institutione*, Toledo, 1599, cited in the Frankfort edition of 1611

MATTHAEI, C. (member of a Brandenburg family?). *Collegium politicum*, Giessen, 1611. *Systema politicum*, Giessen, 1618

MEDERER, B., 1587–1646, professor of theology at Wittenberg. *De legibus*, Wittenberg, 1616

MENOCHIO, J. S., 1576–1655, teacher in the Jesuit College at Milan. *Hieropolitica*, cited in the 2nd edition, Cologne, 1626

MILTON, JOHN, 1608–74. *The tenure of kings and magistrates*, 1648–9. *Eikonoklastes* (an answer to *Eikon Basilike*), 1649. *Defensio pro populo Anglicano* (an answer to the *Defensio regia* of Salmasius, q.v.), 1650–1. Gierke cites these in the 1848 edition (London) of Milton's *Prose Works*

MOLINA, L., 1535–1601, a Spanish Jesuit, who taught for many years at the Portuguese University of Evora. *De justitia et jure*, cited in the Mainz edition of 1614

MOLINAEUS (Dumoulin), C., 1500–66, a famous French teacher of law and legal writer, who was for some time a refugee in Germany, at Tübingen. *Commentarii ad Codicem* (Tübingen lectures), printed 1604

OBRECHT, G., 1547–1612, professor of law at Strasburg. *De justitia et jure*, no. 1 in *Selectorum disputationum*, Strasburg, 1599. *Serenissimae politicae*, 1617, cited in the Strasburg edition of 1644.

OLDENDORP, J., 1480–1561, a jurist who was for some time syndic at Lübeck and then professor at Cologne, afterwards settled at Marburg. *Jura naturalia, gentium et civilia usuque*, Cologne, 1539. Gierke also mentions a work in German, 'Counsels how one may maintain good policy and order in towns and territories', Rostock, 1579. Oldendorp was syndic at Rostock before he went to Lübeck, and that treatise on practical politics, published at Rostock, may have been written originally before he left Rostock in 1534.

OLSZAROWIK, A A *De Polonica Romanum sanctate*, Danzig, 1651. The name suggests a Polish origin (Olszarowski)

OMPHALIUS (Omphalius), J, 1500–67, German jurist *De vera politia libri III*, Cologne, 1565

OSSE, M. VON, 1506?–57, jurist and administrator in the Saxon electorate. *Testamentum* (treating of the duties of a sovereign), addressed to the Saxon Elector Parts were printed in 1607 and 1622, but the first complete edition was that of Thomasius. 1717 The 'testament' was a regular genre in the sixteenth and seventeenth centuries

OTTO, D, 1600?–60?, German jurist. *Dissertatio* (in Arumaeus, q v) *an mutetur status reipublicae status* *Tractatus politicus de imperatore romano et imperatore* (Strasburg, 1623?) *De jure publico Romani imperii*, Jena, 1656 (the first compendium of German public law)

PAUMEISTER (Baumeister), T VON, 1555–1616. jurist and administrator, and a critic of Bodin *Commentarius rerum politicarum et jurisdictionum* *De jurisdictione imp Rom libri II*, 1616

RAMMING, D, 1590–1664, jurist and administrator *Tractatus de regimine saeculari et ecclesiastico*, Giessen, 1619

ROMANUS (Rose, Guillaume), 1542?–1602, preacher and almoner to Henri III, bishop of Senlis, a violent partisan of the League and opponent of Henri IV *Liber de justa reipublicae christianae in reges impios et haereticos authoritate*, Paris, 1590 Romanus, like Boucher (q v), is a Catholic monarchomachus

SALAMONIUS, J MARIA *De Principatu libri VII*, Rome, 1544, cited in the Paris edition of 1578 This is a work which, in the profundity of its thought, deserves to be counted among the classics of the sixteenth century Gierke also cites his Commentary on the *Digest*, Basle, 1530

SALMASIUS (Claude de Saumaise), 1588–1653, French classical scholar, at one time professor at Leyden invited by Prince Charles to write a defence of his father Charles I *Defensio regia pro Carolo I*, November, 1649, cited in the Paris edition of 1651 Milton, on the instruction of the Council of State, replied in his *Defensio pro populo Anglicano*.

SCHOONBORNUS, C, 1579–1637, German jurist, and administrator in Silesia *Politicorum libri VII*, 1614, cited in the 4th edition, printed at Frankfort, 1628

SELDEN, JOHN, 1584–1654 *De jure naturali et gentium, juxta disciplinam Ebraeorum*, London, 1640 *Mare Clausum*, London, 1635

SOTO, D, 1494–1560, Dominican, teacher at the University of Salamanca *De justitia et jure*, 1556 (cited in the Venice edition of 1602)

STRYK, S, see Bibliography B

SUAREZ, F, 1548–1617, Jesuit, professor of philosophy in Spain, one of the greatest thinkers of his order *Tractatus de legibus ac Deo legislatore*, 1611 (cited in the Antwerp edition of 1613)

TUNDER, T VON, *obit* 1643, professor at Bois le Duc *De Regimine civili*, cited in the Louvain edition of his works, 1702

VALENTIA, GREGORIUS DE, 1551–1603, Spanish Jesuit, professor of theology at Ingolstadt *Commentarii theologici*, Ingolstadt, 1598

VASQUEZ, F, 1509–66, ecclesiastical writer on natural law *Controversiarum illustrium aliarumque frequentium libri III*, Frankfort, 1570

VITORIA, F, *obit* 1546, Dominican *Relectiones theologicae*, Ingolstadt, 1580. An earlier edition, *Relectiones undecim* (*de Potestate Ecclesiae*, etc) had appeared in 1565.

VOETIUS, G., 1589–1680, Dutch minister, and afterwards professor at Utrecht. *Politica ecclesiastica*, Amsterdam, 1663–76, vols. I–IV.

VULTEJUS, H., 1565–1634, jurist and classical scholar, professor of jurisprudence at Marburg. *Jurisprudentiae Romanae a Justiniano compositae libri II*, Marburg, 1590. Gierke also refers to his Commentaries on the *Institutes*.

WANDERBACHIUS, J. A., 1581–1652, a German scholar, theologian and professor, from Helmstedt, who lived at Leyden about 1627–33, and wrote there some of his main works, occupied afterwards in affairs at Bremen and Magdeburg, and in the duchy of Brunswick. *Politica pontificia, seu universalis monarchia in omnes Respublicas*, Amsterdam, 1650.

WINKLER, B., 1579–1648, taught at Leipzig and Basle; afterwards syndic at Lubeck, one of the early writers on natural law. *Prudentiae juris libri V*, Leipzig, 1615.

WINTONIENSIS, STEPHANUS (Stephen Gardiner), 1483?–1555, Master of Trinity Hall, Cambridge, 1525–49, and again in 1553, bishop of Winchester, 1551, doctor of civil and of canon law. *Oratio de vera obedientia*, London, 1535 (cited by Gierke from Goldast's *Monarchia* of 1611, I, pp. 716–38).

WITMARS . *Ruminations*.

ZIEGLER, W. Z., 1550–1607, the first systematic writer on the problems of the constitution of the Protestant churches, professor at Herborn, at the same time as Althusius. *De potestate ecclesiastica*, Herborn, 1595.

ZWINGLI, U. Z., 1484–1531. Gierke refers to his Works, as edited by Schuler and Schulthess. See A. Farner's monograph on *Die Lehre von Kirche und Staat bei Zwingli*, 1930.

B. LIST OF AUTHORS CITED 1650–1800

ACHENWALL, G. A. (1719–72) [professor of law in the University of Göttingen, and a student of contemporary comparative politics, who travelled in England and Holland, and was honoured by George III. He published, in 1749, an outline of contemporary politics in the greater European monarchies and republics. Gierke refers to one of his legal works], *Jus Naturae*, as printed in 1781, when the 7th edition appeared. This contains (*a*) *Prolegomena*, 5th edition (first printed in 1758), (*b*) *Pars prior*, 7th edition (first printed in 1750), and (*c*) *Pars posterior*, 8th edition (first printed in 1750).

ALBERTI, V. (1695–97) [Lutheran theologian, and professor at Leipzig], *Compendium juris naturae orthodoxae theologae conformatum*, Leipzig, 1678. [The work has been described as 'an attempt to interpret natural law as the order prevailing in the original sinless condition of man'.]

ABOLER, F. F. VON (1617–1703) [lecturer in law at Würzburg], *Jurisprudentia pro publica, pro privata*, etc., 1670.

BECCARIA, C. B. (1738–94) [an Italian publicist, of noble family, who became a professor of law and economics in Milan], *Dei delitti e delle pene*, Monaco, 1764.

BECKER, C. H. [sometimes *Rugerusgrach* in the principality of Waldeck], *Jus naturae sive ordinem juris naturae*, cited in the 2nd edition, 1698 (first printed in 1690).

BECMANN, J. C. (1641–1717) [professor at Frankfort on the Oder, who wrote a *Historia orbis terrarum geographica et civilis*, and also historical works about the principality of Anhalt. The works to which Gierke refers are his] *Meditationes politicae*, Frankfort, 1679, and his *Conjectur doctrinae politicae*, Frankfort, 1691.

BLACKSTONE, Sir W. (1723–80), *Commentaries on the Laws of England*, 1765–69.

BOECLER, J. H. B. (1611–72) [professor of history at Strasburg, an elegant Latinist, and a classical scholar as well as an historian and writer on politics. The work to which Gierke refers is his] *Institutiones politicae*, Strasburg, 1674.

BOEHMER, J. H., 1674–1749 [professor in the University of Halle, and one of the foremost scholars and jurists of his day, especially in civil and ecclesiastical law. His works on *Jus ecclesiasticum protestantium* and on *Jus parochiale* exercised a great influence. Gierke cites his] *Introductio in jus publicum universale*, in the Prague edition of 1745 (first printed in 1709). [The newly founded University of Halle had a flourishing school of law in the first half of the eighteenth century, see Gundling, Heineccius, Nettelbladt, Thomasius and Wolff *infra*.]

BOSSUET, J. B., 1627–1704 [bishop of Meaux] *Politique tirée des propres paroles de l'Ecriture Sainte*, Paris, 1709 (cited from his *Œuvres complètes*, Tome XVII, Paris, 1826).

CALLAENUS, B. [1614–89, preacher and professor of theology at Helmstedt. Besides a theological work, on the controversies between the churches of the Augsburg Confession and the Roman, he wrote *Tabulae ethicae politicae et physicae*. The work to which Gierke refers is] *Politica sacra*, Jena, 1658 (cited in the 11th edition, of 1711).

CLAUBERG, D., *Politicae compendium methodicum*, Helmstedt, 1675 [Clauberg also wrote a work *De religione politica*, Magdeburg, 1655. He also wrote on the 'theology' and 'oracles' of the 'Gentiles'—i.e. of the ancient world.]

COCCEJI, H. DE, 1644–1719 [a jurist who succeeded to Pufendorf's chair at Heidelberg, but left Heidelberg in 1688, and became professor at Frankfort on the Oder in 1690. He exercised an influence on the study both of natural law and of public law. Guerke refers to his] *Prodromus juris gentium*, Frankfort, 1719, and *Hypomnemata juris ad serum Institutionum Justiniani*, Frankfort, 1698.

COCCEJI, S. DE, 1679–1755 [third son of H. de Cocceji, at first, like his father, a professor at Frankfort on the Oder, but afterwards busily occupied in judicial activities and reforms in Prussia under Frederick William I and Frederick II. Guerke refers to three of his writings] *Dubitatio de principio juris naturalis unico, vero et adaequato*, Frankfort, 1699 [a 'disputation' for the doctorate, in which he expounded his father's ideas on natural law, as based on the will of God. As his father had never published his views, except in lectures, this *Dubitatio* first gave them prominence], *Tractatus juris gentium*, Frankfort, 1702, *Novum systema positivae naturalis et Rationale*, 1740. [The 1740 edition is actually called *Elementa jurisprudentiae, etc.* the title *Novum systema* is first used in a later reprint of 1744.]

COMBERLAND, R., 1630–1709 [really 1631–1718. Cumberland was a member of Pepys' college, Magdalene, and a friend of Pepys. he became bishop of Peterborough in 1691. He published in 1672 his *De legibus naturae disquisitio philosophica*, dedicated to another of his Magdalene friends, one of the great lawyers of the reign of Charles II, Sir Orlando Bridgeman. The work is an answer to Hobbes, on utilitarian lines. Guerke cites it as] *De legibus naturae*, and edition, printed at Lubeck and Frankfort, 1683. [The book was translated from the Latin by Barbeyrac (for whom see under Pufendorf, *infra*), with notes, 1744.]

DARIES, J. G., 1714–91. [He became professor of moral and political philosophy at Jena in 1744. From Jena he moved to Frankfort on the Oder in 1769, where he held the chair of law till his death. He was a voluminous writer, who published works on metaphysics and ethics as well as on law and politics. Guerke refers to his] *Institutiones jurisprudentiae universalis*, cited in the 7th edition, Jena, 1776 (first published in 1746).

EHRENBACH, J. N. MYLER AB, 1610–77 [a man of affairs, as well as a student of politics, who played a considerable part in his time. He was deeply versed in the public law of the Empire. In 1656 he had published an *Outline of the main rights of the Princes and States of the Empire*, which attained great vogue. Later, he planned a larger work, in a number of parts, under the title of *Opus de jure publico imperii Romano-Germanici*. The work to which Guerke refers is the 7th part of this *opus*, dealing with officials, magistrates and their assistants, under the title of] *Hypanthologia*, Stuttgart, 1678.

FELDE, JOHANNES A [a critic of Grotius, and also the writer of a treatise *de pace*], *Elementa juris naturae et in specie juris publici Justinianei*, Frankfort and Leipzig, 1664.

FELWENGER, J. P. [? professor at Altdorf c. 1650–75, acted as *praeses* at disputations on politics, in the fashion of the day], *Dissertationes politicae*, Altdorf, 1666.

FÉNELON, F. DE SALIGNAC DE LAMOTHE, 1651–1715 [tutor to the Dauphin under Louis XIV, and afterwards archbishop of Cambrai. Guerke refers to an] *Essai sur le gouvernement civil, selon les principes de Fénelon*, 3rd edition, by

A. M. Ramsay, London, 1723 [Fénelon's own writings are the *Télémaque* c 1699, and the *Dialogues des morts, composés pour l'éducation d'un prince*, first published in 1712, and republished in an enlarged edition by Ramsay in 1718]

FERGUSON, ADAM, 1723–1816 [professor, first of natural philosophy, and afterwards of moral philosophy, at Edinburgh]. *Essay on Civil Society*, 1766, *Principles of Moral and Political Science*, ['being chiefly a retrospect of lectures delivered in the College of Edinburgh'], 1792

FICHTE, J. G., 1762–1814 [professor of philosophy at Jena, 1794–1799, dismissed for his views, after its foundation in 1810, Rector in 1811–12 of the University of Berlin] Gierke refers to

I. Fichte's *Collected Works*, in the Berlin edition of 1845–6, and therein to the following works

(a) *Contribution to the justification of the opinion of the Public on the French Revolution*, 1793 (*Works*, VI, pp. 109 sqq.);

(b) *Foundations of Natural Law according to the principles of Scientific Theory*, published in 1796–7, at Jena and Leipzig (*Works*, III, pp. 1 sq.),

(c) *A System of Ethical Theory according to the Principles of Scientific Theory*, 1798 (*Works*, IV, pp. 1 sqq.),

(d) *The Self-contained Commercial State* [*Der geschlossene Handelsstaat*], published in 1800 at Tubingen (*Works*, III, pp. 387 sqq.),

(e) *The Foundations of the Present Age*, lectures delivered in 1804–5, published at Berlin in 1806 (*Works*, VII, pp. 257 sqq.),

(f) *The Theory of the State, or the Relation of the Primitive State to the Law of Reason*, lectures delivered in 1813, first published at Berlin in 1820 (*Works*, VII, pp. 367 sqq.)

II. *Posthumous Works*, published in Berlin, 1834, especially the work entitled *A System of Jurisprudence*, lectures delivered in 1812 (in II, pp. 493 sqq.).

FILANGIERI, G., 1752–86 [an Italian publicist, of noble Neapolitan family, who continued the work of the school of legal and political philosophy at Naples inspired by Vico] *La scienza della legislazione*, Naples, 1780

FILMER, Sir R. [*circ.* 1588–1653, a Kentish Royalist who published in 1648 *The Anarchy of a Limited or Mixed Monarchy*, attacking the theory of Philip Hunton's *Treatise of Monarchy* of 1643, along with the writings of Grotius, Hobbes and Milton It is curious, in this connection, to notice (1) that Locke seems to owe some of his theory to Hunton, and (2) that Locke, very naturally, seeks to prepare the way for his own theory, in the *Second Treatise*, by attacking Filmer in the *First* Gierke refers to the work by which Filmer is best known], *Patriarcha*, published posthumously in 1680

FREDERICK II [King of Prussia], 1712–86 [Gierke refers to three of his writings]

(a) *Considérations sur l'état présent du corps politique de l'Europe*, 1738 (*Œuvres* VIII, pp. 1 sqq.);

(b) *Antimachiavelli*, 1739, edited by Voltaire 1740 (*Ibid.* VIII, pp. 59 sqq.),

(c) *Essai sur les formes de gouvernement et sur les devoirs des Souverains*, 1777 (*Ibid.* IX, pp. 195 sqq.)

GUNDLING, N. H., 1671–1729 [the son of a clergyman, trained for the Church, who turned to law under the influence of Thomasius, and became ultimately professor of natural and international law at Halle He wrote a great number of dissertations and compendia—partly, it is said, to escape from the distractions of an unhappy marriage. Gierke refers to]

(a) *Jus naturæ et gentium*, as printed in the 2nd edition (Halle and Magdeburg, 1708: the 1st edition had appeared in 1714),

(b) A *Discursus* on natural and international law [published posthumously, as many of his *Discursus* were], Frankfort, 1734,

(c) *Exercitationes academicæ*, more especially,

(1) *Exer* iv, pp 155–299 (entitled *Status naturalis Hobbiani in corpore juris civilis defensus et defendendus*, and belonging to the year 1706),

(2) *Exer* xvi, pp 629–699 (*De concordiâ dictorum quique poenæ*, 1724).

HEINECKE, F. J., *Systema juris publici universalis*, 1763. [This is the only information which Gierke gives The *Allgemeine Deutsche Biographie* gives an account of F J. Heinke (1726–1803), a Silesian who studied at Prague, where he became director and President of the Law Faculty—eventually entering the service of the government in Vienna in 1767 But the *Biographie* does not mention any *Systema juris* as having been published by him]

HEINECCIUS, J G, 1681–1741 [professor of law at Halle, and elsewhere, and one of the greatest of the German jurists of the eighteenth century. Gierke refers to three of his works]

(1) *Elementa juris naturæ et gentium*, first published in 1737 (printed in vol 3 of *Opera omnia*, Geneva, 1741 onwards),

(2) *Prælectiones academicæ in Hugonis Grotii de jure belli et pacis libros*, published in 1744 (*Opera omnia*, viii, 1),

(3) *Prælectiones academicæ in S Pufendorfii de officio hominis et civis libros*, 2nd edition, 1748

HERDER, J G., 1744–1803 [German critic, man of letters, and collector of *Volkslieder* Gierke refers to his] *Ideen zur Geschichte der Menschheit*, 1784–5 (in his *Collected Works in Philosophy and History*, vols iv–vii).

HERTIUS, J N, 1652–1710 [one of the leading jurists of Germany in the seventeenth century, and professor of law at Giessen Gierke refers to]

(a) *Elementa prudentiæ civilis*, 1669 (cited in the 2nd edition, Frankfort on the Main, 1709),

(b) *Commentationes atque opusculorum vol II*, as published in 1737, at Frankfort on the Main (the items had been first published in 1700 and 1716)

HOFFBAUER, J C [1766–1827, professor of philosophy at Halle], *Naturrecht aus dem Begriffe der Rechts entwickelt*, 1793 (cited in the 3rd edition, Halle, 1803)

HOMMIUS, J F, 1630–70? [not mentioned in the German or Dutch National Biographies Gierke refers to two works] *De subjecto juris naturalis*, Utrecht, 1669, *Politicorum pars architectonica*, Utrecht, 1664 [reprinted as *Architectonica de Civitate*, with notes by S Kuchenbecher, Leyden, 1699]

HUBER, U, 1636–94 [a Dutch jurist of eminence, professor at Franeker in Friesland]

(1) *De jure civitatis*, 1674 (cited in the Franeker edition of 1713),

(2) *Prælectiones juris civilis iuxta III*, 1686 (cited in the Leipzig edition of 1733),

(3) *Institutiones juris publici*, in *Opera minora*, 1, 1 (the Utrecht edition of 1746)

HUMBOLDT, W. von, 1767–1835 [thinker and statesman, Prussian minister of education, 1809–10]

(1) *Ideas for an essay on the limits of the activity of the State*, 1792

Parts printed in *Thalia* [Schiller's Leipzig magazine], 1792, and in the *Berlin Monthly*, 1792, published complete, Breslau, 1851.

HUME, D., 1711–76 [*Essays Moral and Political*, 1741–2. Gierke refers to the edition of the] *Political Essays*, translated into German by C. J. Kraus, Königsberg, 1813.

IGNATZ, S. A., 1702–76 [a jurist in the Bavarian service, for some time professor, at Ingolstadt, of public and international law and the law of nature, under the style of jus *communicatorum*], *Opuscula juridica varii argumenti*, vol. 1, Ingolstadt and Augsburg, 1747, vol. 11, Munich and Ingolstadt, 1759.

JENA, G. VON, 1620–1703 [a jurist in the service of the Great Elector and his successor, for some time professor at Frankfort on the Oder], *Collegium juris publici*, Frankfort on the Main, 1658 (it also appeared as *Fragmenta de rebus status*, 1657). [A series of dissertations.]

JUSTI, J. H. G. VON, 1720–71 [professor at Vienna of 'applied politics', afterwards in the Prussian service]

(1) The *Foundations of a good government*, in five books, Frankfort and Leipzig, 1759.

(2) The *Nature and Essay of States*, Berlin, Stettin and Leipzig, 1760.

[The work on applied politics for which Justi was best known was entitled, *The Basis of the power and prosperity of States, or a detailed account of the whole system of policy* (*Polizeywissenschaft*), of which vol. 1 appeared in 1760, and vol. 11 in 1761. But this was only one of a considerable number of political writings—among them the two which Gierke cites. Justi had a varied and wandering career, which led him incidentally into the management of mines, but he found time to write a great number of books, and his friends called him the Buffon of Germany.]

KANT, I., 1724–1804 [professor of logic at Königsberg]. *Collected Works*, in chronological order, edited by G. Hartenstein, Leipzig, and especially

(1) *On the saying, 'That may be right in theory, but it has no value in practice'*, 1793 (*Works*, VI, pp. 309 sqq.).

(2) *Perpetual Peace*, 1795 (*Ibid.* VI, pp. 405 sqq.).

(3) *Metaphysic of Morality* (*Ibid.* VII, pp. 1 sqq.), containing the 'Metaphysical Elements of Jurisprudence', and the 'Metaphysical Elements of Ethics', which appeared separately in 1797 and were put together in one volume in 1798.

[In English, see T. K. Abbott, *Kant's Critique of Practical Reason, and other works on the theory of Ethics*.]

KEMMER, H. E., 1671–1723 [professor of law at Rintein, near Minden]

(1) *Jus naturæ et gentium, ex ipsis fontibus ad ductum Grotii Pufendorfii et Cocceji deductum*, Rintein, 1705.

(2) *Compendium juris naturæ*, Rintein, 1707.

KLEIN, E. F., 1744–1816 [a jurist who took a considerable part in the development of Prussian law towards 1800, and also lectured at the University of Halle, 1791–1801], *Short Essays*, Halle, 1797 (the Essay 'On the nature of civil Society' is in II, pp. 55 sqq.).

KNICHEN, R. G. [died in 1684, was the son of A. Knichen, who had been a professor of law, and had defended the cause of the territorial princes against the towns. He wrote] *Opus politicum*, Frankfort on the Main, 1682.

KRESSMAYR, W. X. A. VON, 1705–90 [Bavarian State-Chancellor, and codifier of the law of Bavaria], *Outline of general and of German public law*, Munich, 1770.

KULPIS, J. G., 1652–98 [professor of public institutions and public law at Strass-

burg, 1689–6, afterwards in government service in Württemberg]. *Dissertatione academicae*, Strasburg, 1703

LEIBNIZ, G. W., 1646–1716.

A. *Opera omnia*, ed. Dutens, Geneva, 1768—the various essays on law and politics, in iv, 3, pp. 159 sqq., including:

(1) *Nova methodus discendae docendaque jurisprudentiae*, 1667;

(2) *Observationes de principio juris*, 1670;

(3) *Monita quaedam ad S. Pufendorfii principia*;

(4) *De iure cudendae gentium diplomatum mentis*;

(5) *Conatus-Fundamenta tractatus de jure suprematus ac legationum Principum Germaniae*, 2nd edition, 1678;

(6) *Specimen demonstrationum politicarum pro eligendo Rege Polonorum*

B. *Gerhardt Writings*, edited by Gubrauer, 1838–40—the 'Fragment on the Law of Nature' in i, pp. 414 sqq.

LOCKE, JOHN, 1632–1704.

(1) *Two treatises on Government*, London, 1690.

(2) *Letter on Toleration* [first published in Latin in 1689, and then in an English Translation in the same year, other letters added, 1690, 1692 and 1705]. Cited from the *Works*, as published in London, 1801, vol. v, pp. 207 sqq. and vol. vi.

DE LOLME, J. L., 1740–1806 [a Swiss political writer, mainly on English politics], *La Constitution d'Angleterre*, 1771, translated into English, 1775.

LUDEWIG, J. P. von, 1668–1743 [professor of philosophy, and afterwards of history and public law, at Halle], *Opuscula minora*, Halle, 1720.

MABLY, Abbé de, 1709–85. [French publicist]

(1) *Doutes proposés aux philosophes économistes sur l'ordre naturel et essentiel des sociétés politiques*, The Hague [a work directed against Mercier de la Rivière, q.v.].

(2) *De la législation, ou des principes de lois*, Amsterdam, 1776.

MEVIUS, D., 1609–70 [jurist; professor at Greifswald, where his father and grandfather had both been professors before him; sometime syndic of Stralsund, and also in the service of Sweden and Mecklenburg]. *Prodromus jurisprudentiae gentium commentis*, Stralsund, 1672.

MICRAELIUS, J., 1597–1658 [professor at Stettin, historian of Pomerania], *Regis Palatinus Scenica*, Stettin, 1654. [In 1647 there had already been published, at Stettin, *J. Micraelii aphorismi de regno politico pensitis*.]

MONTESQUIEU, C. de SECONDAT, Baron de la Brède et de Montesquieu, 1689–1755 [president of the court at Bordeaux], *Esprit des lois*, 1748 (cited in the Amsterdam edition of 1749).

MOSER, F. K. von, 1723–98 [publicist and statesman, engaged in government service in South Germany, and for some time also in Austria]. *Master and Servant* [i.e. the sovereign and his minister], *discussed with patriotic freedom*, Frankfort, 1759 (written in 1758). *On the German national spirit*, 1763. *On Governments, Governing and Ministers, material* [literally 'rubbish'] *for improving the state of the coming century*, Frankfort, 1784.

MOSER, JUSTUS, 1720–94 [lawyer and statesman in the bishopric of Osnabruck, where he was *advocatus patriae* and secretary to the order of Knights, a popular author, compared by Goethe to Benjamin Franklin]. *History of Osnabruck*, Osnabruck, 1768. *Patriotic Phantasies*, edited by his daughter, Berlin, 1778–86. *Miscellaneous Writings*, edited by Nicolai, Berlin, 1797–8.

MOLLENBRAK, J. C., the elder. *Positiones Inaugurales*, 2nd edition, Halle-Magdeburg, 1698 (first printed in 1692).

MOLLERUS, J. J. [? Professor Utriusque Juris at Copenhagen]. *Institutiones Politicae*, Jena, 1692.

NATIONAL ASSEMBLY—Proceedings of the French N.A. in regard to the confiscation of ecclesiastical property, October 10 to November 2, 1789, *Gazette Nationale ou le Moniteur universel* (par l'an IV de la République, pp. 291 sqq.). Cf. Hübler, *Die Eigentumer des Kirchengutes*, pp. 46 sqq., 56 sqq. Paul Janet, *Revue des deux Mondes*, Tome 23 (1877), pp. 334–49. [Gierke's reference to the *Gazette Nationale* is puzzling. When he adds the reference to l'an IV, is he thinking of an edition, such as appeared at Milan, 1802–5, which contained in 74 vols. the Gazette from May 5, 1789, to the 28th of Nivôse, year IV?].

NEUTHEILAUF, D., 1719–91 [professor of law at Halle, and one of the greatest teachers of law in later eighteenth-century Germany]. *Systema elementare universae jurisprudentiae naturalis*, cited in the 5th edition, Halle, 1785 (first printed in 1748; the present arrangement was first adopted in the 3rd edition of 1776), *Systema elementare jurisprudentiae patriae Germanorum generalis*, Halle, 1781. [Neuthilardt was a pupil of Wolff at Marburg, and followed him to Halle.]

PAZUELO, A., 1583–1672 [a Spanish jurist, settled in the Netherlands, who was professor at Louvain from 1614 onwards]. *Jus publicum, quo arcana et jura Principis adornantur*, Amsterdam, 1657.

PLACCIUS, V. P., 1642–99 [a German scholar from Hamburg, who studied in German universities and Italy, and afterwards practised and taught law in his native city. He was a man of means, who corresponded with various scholars of his day, and wrote on a variety of subjects]. *Anonymus juris naturalis, privati et publici*, Hamburg, 1695.

PRASCHIUS, J. L., 1637–90 [a citizen of Ratisbon, where he held high office and was deep in all civic affairs; philologist, writer of verse, and dramatist, as well as a writer on laws and politics]. *Designatio juris naturalis ex disciplina Christianorum*, Ratisbon, 1688.

PUFENDORF, S., 1632–94 [publicist, jurist, and historian; taught at the university of Heidelberg, 1661–8; professor in Lund, on the invitation of Charles XI of Sweden, 1670 onwards; historiographer at Stockholm in 1677, and at Berlin in 1688; one of the greatest scholars of his century, and one of the greatest figures in the history of natural law]

(1) *Elementorum jurisprudentiae universalis libri II*, 1660 (cited in the Frankfort and Jena edition of 1680).

(2) Severinus de Monzambano [pseudonym* adopted by Pufendorf to cover his exposition and critique of the political position of Germany], *De statu Imperii Germanici*, Geneva [really the Hague], 1667 (cited in the edition published at 'Utopia', 1668). There is a new and critical edition by F. Salomon, Weimar, 1910, in *Quellen und Studien zur Verfassungsgeschichte des Deutschen Reichs*, III, 4.

(3) *De jure naturae et gentium libri VIII*, 1672 (cited in the Frankfort and Leipzig edition of 1744, with notes by Hert and Barbeyrac).

(4) *De officio hominis et civis secundum legem naturalem libri II*, Leyden, 1673 (cited in the Leyden edition of 1769, with 'observations' by Titius, Carmichael, Treuer and Barbeyrac).

(5) *Dissertationes academicae selectae*, Upsala, 1677.

* Cf. Caesarinus-Furstenerius above, under Leibnitz.

[Barbeyrac (1674–1729), a Huguenot who taught in Berlin, Lausanne and Groningen, translated into French, and annotated, not only (3) and (4) above, but also Grotius *De jure belli et pacis*.]

[Pufendorf's *De habitu religionis Christianae ad vitam civilem liber singularis*, 1687, may also be mentioned, as dealing with the relations of Church and State and the problem of toleration at a time when the Revocation of the Edict of Nantes had disturbed men's minds. It is almost contemporary with Locke's *Letter on Toleration*, which deals with the same problems in the same atmosphere.]

RACHELIUS, S., 1628–91 [jurist and politician: professor of natural and international law at Kiel after 1665], *Institutionum jurisprudentiae libri IV*, Kiel and Frankfort, 1681.

DE LA RIVIÈRE, P. F. J. H. LE MERCIER, 1720–94 [a disciple of Quesnay, and one of the Physiocrats], *L'ordre naturel et essentiel des sociétés politiques*, Paris, 1767.

ROUSSEAU, J. J., 1712–78.

(1) *Discours sur l'origine et les fondements de l'inégalité parmi les hommes*, Paris, 1753.

(2) *Du contrat social, ou principes du droit politique*, Amsterdam, 1762.

(3) *Lettres écrites de la Montagne*, Amsterdam, 1764.

[Cf. C. E. Vaughan, *The Political Writings of Rousseau*, Cambridge, 1915.]

SCHMOHMANNIUS, H. C. [1739–88, professor of law at Jena and Stuttgart], *Public Law, treated according to reason and the customs of the leading nations*, Jena, 1770–73.

SCHLÖZER, A. L. VON, 1735–1809 [travelled in Sweden and Russia, professor at Göttingen, publicist, historian and educationalist, who, *inter alia*, continued the work of Achenwall on contemporary politics and institutions in his *Theorie der Statistik* of 1804. Gierke refers to his] *General Public Law and the Theory of Constitutions*, Göttingen, 1793.

SCHLÖZER, C. VON [1774–1831, eldest son of the foregoing, professor of the political sciences at Moscow, *circ.* 1790–1827, lecturer at Bonn, 1828–31], *Kleine Schriften*, Göttingen, 1807, especially

(1) *De jure suffragii in comitiis urbanis*, Göttingen, 1795, pp. 11 sqq.;

(2) *Primae lineae scientiarum politicarum*, pp. 81 sqq. [Moscow, 1802.]

[His chief importance perhaps lies in the field of political economy. He published at Riga in 1805 and 1807 two volumes on *The Principles of Political Economy or the Theory of National Wealth*.]

SCHMIER, F., 1680–1728 [canonist, professor and rector of the University of Salzburg, prior of Feldkirch] *Jurisprudentia publica universalis*, Salzburg, 1722; *Jurisprudentia publica imperii Romano-Germanici*, Salzburg, 1731.

SCHORCHT, F. A. Feinhoeffer de, Baron, *Arcanum status libri X*, Frankfort, 1710.

SECKENDORF, V. L. VON, 1626–92 [historian and ducal librarian in the duchy of Gotha; afterwards chancellor in one of the Saxon duchies, a disciple of Boecler (q.v.) at Strasburg] *The German Principality*, 1656 (cited in the 5th edition, 1678), *The Christian State*, 1685, *German Addresses*, 1686.

SIDNEY, ALGERNON, 1622–80, *Discourses concerning government* [an answer to Filmer's *Patriarcha*, written shortly after its publication in 1680, first printed in 1698], cited in the Edinburgh edition of 1750.

SIEYÈS, E., Abbé, 1748–1836. [His writings, including his *Qu'est-ce que le Tiers État* and his *Observations sommaires sur les bases fédératives* of 1789, are cited

by Gierke in a German translation.] *Political Writings*, a complete collection by the German translator, 2 volumes, 1796.

SPINOZA, B., 1632–77. *Tractatus Theologico-politicus*, cited in the Hamburg edition of 1670; *Tractatus Politicus*, in the *Opera Posthuma* of 1677, pp. 267–299; *Ethica, ibid.*, pp. 1–299. [The best modern edition is that of van Vloten and Land, 1895.]

[STRYK, S., 1640–1710, professor at Frankfort on the Oder and afterwards, from 1692 to his death, at Halle, where he was also dean of the Faculty of Law and Rector of the University. His chief work was his *Usus modernus Pandectarum*. Gierke refers *passim* to his *Dissertationes*.]

THOMASIUS, C., 1655–1728 [professor at Leipzig and afterwards at Halle: a philosopher and a man of general culture as well as a famous jurist, who advocated the use of German instead of Latin, and attacked Aristotle and scholasticism. His name is connected with the beginnings of the University of Halle, and with its legal fame].

(1) *Institutiones jurisprudentiae divinae*, written in 1687 (cited in the Frankfort and Leipzig edition of 1709).

(2) *Fundamenta juris naturae et gentium ex sensu communi deducta*, Halle and Leipzig, 1705.

(3) *Dissertationes*, 4 volumes, Halle, 1693.

TITIUS, G. G., 1661–1714 [lectured at Leipzig on law from 1688, but did not become Professor until 1710, a pupil of Thomasius].

(1) *Specimen juris publici Romano-Germanici*, 1698 (cited in the 2nd edition, Leipzig, 1705);

(2) *Dissertationes juridicae*, Leipzig, 1709.

TURGOT, A. R. J., baron de l'Aulne, 1727–81. Article on *Fondation* in the *Encyclopédie*, vol. VII, 1757, *Lettre sur la tolérance* [? 1758], in *Œuvres*, Paris, 1844, II, pp. 673–699.

VICO, J. B., 1668–1744 [philosopher, historian and jurist, professor at Naples, where he inspired a school of legal and political philosophy. Gierke refers to] *De universi juris uno principio et fine uno*, Naples, 1720, *Principi di una scienza nuova intorno alla comune natura delle nazioni*, Naples, 1725 (cited in the Milan edition of his *Opere*, 1836, vols. III–IV).

WAGNER, J. G., *Organum juris naturalis, sive de jure naturae hominum demonstratione mathematicae*, Berlin, 1704.

WOLFF, C., 1679–1754 [philosopher, mathematician and jurist, professor of Mathematics and Natural Philosophy at Halle, 1706–23, after troubles there, professor at Marburg, but restored to Halle by the action of Frederick the Great in 1740 as professor of *jus naturae et gentium*, a friend of Leibniz, and one of the great figures in the history of German philosophy. Gierke refers to his]

(1) *Jus naturae methodo scientifica pertractatum*, Frankfort and Leipzig, 1740–50;

(2) *Institutiones juris naturae et gentium*, Halle, 1750 (In German, under the title of *Grundsätze des Natur- und Völkerrechts*, 1754);

(3) *Rational Thoughts on the social life of mankind, and particularly on the Commonwealth* [von dem gemeinen Wesen], Halle, 1721.

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